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47187

FRANK THOMAS,

Appellee,

v.

PAUL IMPALLARIA,

Appellant.

161A.147  
APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

MR. PRESIDING JUSTICE SCHWARTZ  
DELIVERED THE OPINION OF THE COURT.

This is an appeal from a judgment on verdict for \$1500 for damages sustained by the forcible and unlawful entry of defendant and the eviction of plaintiff from premises leased by plaintiff from defendant. Plaintiff leased the premises, a cottage of approximately four rooms and a basement, in 1952 on a month to month basis at a rental of \$40 per month. Plaintiff and his family lived in the premises until April 1955. He paid the rent for April and on April 9, 1955, he and his family left on vacation and did not return until April 23rd. On their return plaintiff found that the cottage was up on stilts and that there was no way of getting into the building. He further found that everything he kept in the basement, including furniture, children's toys, and all his tools were damaged or missing. He climbed up the forms or stilts upon which the house had been perched and found that the plaster had cracked when the building was lifted and had fallen over his furniture and belongings, that the kitchen windows had been broken, the electricity shut off and the contents of the refrigerator had run out over the room. It was thus utterly impossible for plaintiff to resume occupancy of the premises.

The only point made by defendant in defense or



-2-

extenuation of his entry was that work had to be done to the premises and accordingly he had let the work to an independent contractor and that he is not liable for the wrongful act of the contractor. Defendant cites a number of cases in which persons injured seek recovery against owners because of the negligence of independent contractors. These cases are not relevant.

In the instant case plaintiff before he left for his vacation told defendant he was going out of town. Defendant said nothing to him about entering the premises for the purpose of making the extensive repairs required. According to defendant's testimony, he engaged the contractor on April 1, 1955, to do the work which involved raising the cottage, constructing a new side and brick wall, and putting steel posts in the basement. The contractor was to start work April 8. He actually commenced the work after plaintiff and his family left for their vacation. The forcible entry and detainer statute specifically provides that no person shall make an entry into lands except in cases where entry is allowed by law, and in such cases he shall not enter by force, but in a peaceable manner. In Christensen v. Frankland, 324 Ill. App. 391, defendant while acting as administrator had through an agent directed a constable to evict the plaintiff. The court said that it is the law that where an officer in the execution of a writ becomes liable for damages as a trespasser, all who direct, request, aid or abet become joint trespassers with him and are



-3-

responsible for damages that result. Wolf v. Boettcher, 64 Ill. 316. In the instant case the owner did more than aid or abet. He directed the contractor to do what defendant knew must result in an eviction.

It is contended by defendant that a landlord has the right to enter for the purpose of making necessary repairs. Assuming this to be the law, it does not mean that the landlord had the right to embark on such an extensive operation as was here undertaken which would necessarily exclude plaintiff from occupying the premises.

Complaint is made that the court failed to give an instruction relating to the preponderance of the evidence. After the court had finished giving instructions, had instructed the jury with respect to the forms of verdict, and had directed the bailiff to take the jury to their room, counsel for defendant said to the court:

"Your Honor failed to give certain instructions, such as that the plaintiff must prove his case by a preponderance of the evidence, and -

"The Court: I will see; it may not be necessary."

The matter was thus left in this uncertain situation. Counsel made no further motion of any kind. Under such circumstances, nothing was preserved for review in this court.

No complaint is made with respect to the amount of damages.

Judgment affirmed.

McCormick and Robson, JJ., concur.

Abstract only.

-1-

re-prepare for defense that result. Walter V. Hoffmann, 65  
111, 112. In the time of the case and then after  
about. He directed the construction to be what he wanted known  
and result in an evidence.

It is contended by defendant that a defendant is in  
right to answer for the purpose of making necessary reply.  
assuming this to be the law, it does not mean that the defendant  
has the right to answer on such an extensive question as was  
here undertaken which would necessarily exclude himself  
from answering the question.

Defendant is made that the court failed to give an  
instruction relating to the preponderance of the evidence.  
After the court had finished giving instructions, had  
instructed the jury with respect to the form of verdict, and  
had directed the jury to take the jury to their room,  
counsel for defendant told to the court:

"Your Honor failed to give with the instructions  
such of the instructions that I have made."

"The court," I will say, do not not be concerned."

The court was then told that the instructions were  
made in French and in English. The court said that it was  
nothing was present for the jury to take the jury to  
the court. The court said that it was the court of

defendant.

Defendant's attorney.



3

47165

FERRIS KATTANY,

Appellee,

v.

SUSAN KATTANY,

Appellant.

A

16 I.A.<sup>2d</sup> 148

APPEAL FROM SUPERIOR  
COURT, COOK COUNTY.

MR. JUSTICE McCORMICK DELIVERED  
THE OPINION OF THE COURT.

Suit was brought in the Superior Court of Cook County by Ferris Kattany against Susan Kattany to annul a marriage entered into between the parties at Louisville, Kentucky, on August 18, 1941. As grounds for annulment the complaint alleged that the said marriage was in violation of a statute then existing and which is still in force (Ill. Rev. Stat. 1955, ch. 89, par. 1), which forbade marriages between cousins of the first degree; that the parties at the time of the marriage in Kentucky (the laws of which State permitted marriages between cousins of the first degree) were residents of the State of Illinois; that at no time was either party "ever a resident of the State of Kentucky, that they never intended to reside in the State of Kentucky, and returned to the State of Illinois in three days after the purported marriage."

The defendant filed an answer which admitted that the parties had entered into a marriage at Louisville, Kentucky, on August 18, 1941; that they cohabited together as husband and wife until January 15, 1956;

1. The first part of the paper is devoted to the study of the properties of the function  $f(x)$  defined by the equation

$$f(x) = \int_0^x \frac{1}{1+t^2} dt$$

for  $x \in \mathbb{R}$ . It is shown that  $f(x)$  is an odd function and that  $f(x) \in C^1(\mathbb{R})$ . Moreover, it is proved that  $f(x)$  is a strictly increasing function and that  $f(x) \in C^2(\mathbb{R})$ .

2. In the second part of the paper, we study the properties of the function  $g(x)$  defined by the equation

$$g(x) = \int_0^x \frac{1}{1+t^2} dt$$

for  $x \in \mathbb{R}$ . It is shown that  $g(x)$  is an even function and that  $g(x) \in C^1(\mathbb{R})$ . Moreover, it is proved that  $g(x)$  is a strictly increasing function and that  $g(x) \in C^2(\mathbb{R})$ .

3. In the third part of the paper, we study the properties of the function  $h(x)$  defined by the equation

$$h(x) = \int_0^x \frac{1}{1+t^2} dt$$

for  $x \in \mathbb{R}$ . It is shown that  $h(x)$  is an odd function and that  $h(x) \in C^1(\mathbb{R})$ . Moreover, it is proved that  $h(x)$  is a strictly increasing function and that  $h(x) \in C^2(\mathbb{R})$ .

4. In the fourth part of the paper, we study the properties of the function  $k(x)$  defined by the equation

$$k(x) = \int_0^x \frac{1}{1+t^2} dt$$

for  $x \in \mathbb{R}$ . It is shown that  $k(x)$  is an even function and that  $k(x) \in C^1(\mathbb{R})$ . Moreover, it is proved that  $k(x)$  is a strictly increasing function and that  $k(x) \in C^2(\mathbb{R})$ .

5. In the fifth part of the paper, we study the properties of the function  $l(x)$  defined by the equation

$$l(x) = \int_0^x \frac{1}{1+t^2} dt$$

for  $x \in \mathbb{R}$ . It is shown that  $l(x)$  is an odd function and that  $l(x) \in C^1(\mathbb{R})$ . Moreover, it is proved that  $l(x)$  is a strictly increasing function and that  $l(x) \in C^2(\mathbb{R})$ .

that three children were born to the said marriage. In the answer the defendant admits that she is a first cousin of the plaintiff and states that prior to the marriage in Kentucky she and the plaintiff intended to move to the State of Kentucky and live there; that there was no intention to violate the statutes of the State of Illinois, but that the plaintiff had failed to find work in Kentucky and as a result they moved back to the State of Illinois. With the answer she filed a counterclaim for separate maintenance. After a hearing the court entered a decree annulling the marriage. No order was entered with regard to the counterclaim.

Section one of the Uniform Marriage Evasion Act (Ill. Rev. Stat. 1955, ch. 89, par. 19), in effect at the time of the marriage in 1941, provides:

"That if any person residing and intending to continue to reside in this state and who is disabled or prohibited from contracting marriage under the laws of this state shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state."

The marriages of first cousins are void under paragraph 1, chapter 89, Illinois Revised Statutes 1955. The marriages of first cousins are valid under the law of Kentucky. If the parties had gone to Kentucky intending to establish a residence there, had been married there and had subsequently returned to Illinois, the courts of Illinois would treat

14. if 0 < x then return 0 else return 1 endif

1. *Staphylococcus aureus* 2. *Staphylococcus epidermidis* 3. *Staphylococcus saprophyticus* 4. *Staphylococcus sciuri* 5. *Staphylococcus carnosus* 6. *Staphylococcus hyicus* 7. *Staphylococcus saprophylus* 8. *Staphylococcus aureus* 9. *Staphylococcus aureus* 10. *Staphylococcus aureus* 11. *Staphylococcus aureus* 12. *Staphylococcus aureus* 13. *Staphylococcus aureus* 14. *Staphylococcus aureus* 15. *Staphylococcus aureus* 16. *Staphylococcus aureus* 17. *Staphylococcus aureus* 18. *Staphylococcus aureus* 19. *Staphylococcus aureus* 20. *Staphylococcus aureus* 21. *Staphylococcus aureus* 22. *Staphylococcus aureus* 23. *Staphylococcus aureus* 24. *Staphylococcus aureus* 25. *Staphylococcus aureus* 26. *Staphylococcus aureus* 27. *Staphylococcus aureus* 28. *Staphylococcus aureus* 29. *Staphylococcus aureus* 30. *Staphylococcus aureus* 31. *Staphylococcus aureus* 32. *Staphylococcus aureus* 33. *Staphylococcus aureus* 34. *Staphylococcus aureus* 35. *Staphylococcus aureus* 36. *Staphylococcus aureus* 37. *Staphylococcus aureus* 38. *Staphylococcus aureus* 39. *Staphylococcus aureus* 40. *Staphylococcus aureus* 41. *Staphylococcus aureus* 42. *Staphylococcus aureus* 43. *Staphylococcus aureus* 44. *Staphylococcus aureus* 45. *Staphylococcus aureus* 46. *Staphylococcus aureus* 47. *Staphylococcus aureus* 48. *Staphylococcus aureus* 49. *Staphylococcus aureus* 50. *Staphylococcus aureus* 51. *Staphylococcus aureus* 52. *Staphylococcus aureus* 53. *Staphylococcus aureus* 54. *Staphylococcus aureus* 55. *Staphylococcus aureus* 56. *Staphylococcus aureus* 57. *Staphylococcus aureus* 58. *Staphylococcus aureus* 59. *Staphylococcus aureus* 60. *Staphylococcus aureus* 61. *Staphylococcus aureus* 62. *Staphylococcus aureus* 63. *Staphylococcus aureus* 64. *Staphylococcus aureus* 65. *Staphylococcus aureus* 66. *Staphylococcus aureus* 67. *Staphylococcus aureus* 68. *Staphylococcus aureus* 69. *Staphylococcus aureus* 70. *Staphylococcus aureus* 71. *Staphylococcus aureus* 72. *Staphylococcus aureus* 73. *Staphylococcus aureus* 74. *Staphylococcus aureus* 75. *Staphylococcus aureus* 76. *Staphylococcus aureus* 77. *Staphylococcus aureus* 78. *Staphylococcus aureus* 79. *Staphylococcus aureus* 80. *Staphylococcus aureus* 81. *Staphylococcus aureus* 82. *Staphylococcus aureus* 83. *Staphylococcus aureus* 84. *Staphylococcus aureus* 85. *Staphylococcus aureus* 86. *Staphylococcus aureus* 87. *Staphylococcus aureus* 88. *Staphylococcus aureus* 89. *Staphylococcus aureus* 90. *Staphylococcus aureus* 91. *Staphylococcus aureus* 92. *Staphylococcus aureus* 93. *Staphylococcus aureus* 94. *Staphylococcus aureus* 95. *Staphylococcus aureus* 96. *Staphylococcus aureus* 97. *Staphylococcus aureus* 98. *Staphylococcus aureus* 99. *Staphylococcus aureus* 100. *Staphylococcus aureus*

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The following table shows the results of the regression analysis:

1993 and 1994, and 1995 and 1996, respectively.

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1. *Journal of the American Medical Association*, 1990; 263: 1025-1028.

1. *Phragmites australis* (Cav.) Trin. ex Steud.

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1. The first group of variables is the set of variables that are used to describe the characteristics of the firm. These variables are: size, age, industry, and location. Size is measured by the number of employees, age by the year of establishment, industry by the two-digit SIC code, and location by the state of the firm's headquarters.

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the marriage as valid inasmuch as it was valid according to the law of the state where contracted. Reifschneider v. Reifschneider, 241 Ill. 92; Linneman v. Linneman, 1 Ill. App.2d 48; Ertel v. Ertel, 313 Ill. App. 326; Restatement of Conflict of Laws, Sec. 121.

The only question before the court was the question of the intention of the parties at the time they left Illinois and went to the State of Kentucky. In order for the court to find the marriage void it must find that they had intended to continue to reside in the State of Illinois. Reifschneider v. Reifschneider, 241 Ill. 92, lays down the universally accepted rule that when a celebration of a marriage is once shown, the contract of marriage, the capacity of the parties, and, in fact, everything necessary to the validity of the marriage, in the absence of proof to the contrary, will be presumed; and also that when a marriage is shown the law raises a strong presumption in favor of its validity and the burden is cast upon the party objecting to the validity to prove such facts and circumstances as necessarily establish its invalidity.

The plaintiff testified that he and the defendant were first cousins; that he was employed in 1941 by Mosley & Company; that prior to the marriage he had talked to Edmond Mosley who was a lawyer and a partner in the company employing him; that he and Mosley looked up the marriage laws in Kentucky and he determined that he could get married there; that he went there solely for the



purpose of getting married and did not intend to stay permanently in Kentucky; that he went to Kentucky with the defendant and her father; that he and the father occupied a room in a boarding house and the defendant occupied another room; that subsequently on September 7, 1941, in Chicago there was a religious ceremony performed between the parties and a wedding reception held; that they did not cohabit as husband and wife until after the religious ceremony; that when he returned to Chicago he went back to his job at Mosley & Company. The only corroboration presented on his behalf was testimony of Edmond Mosley, who testified that the plaintiff was employed by him in 1941; that he recollected no conversation with the plaintiff; that he did not know whether the plaintiff went to Kentucky or not or if he was out of town at all; that during the months of July, August and September no deductions were made from the plaintiff's wages.

The defendant testified that before the marriage the plaintiff had told her that in Illinois first cousins could not marry but that if they went to Kentucky with the intention of living there the marriage would be legal even if they subsequently left Kentucky, and that she agreed with him to go to Kentucky and make a home there; that at first the plaintiff wanted to go to Paducah and he had, in the presence of defendant and her father, discussed the matter with one Mark Jacobs, a mutual friend whose wife came from Paducah and whose family still lived there; that later





plaintiff said he had changed his mind about going to Paducah and they would go to Louisville, which was a larger city, where he would have better opportunities to get a job.

The plaintiff testified that they went to Kentucky on a Friday, had their necessary physical examinations on Saturday, were married on Monday and returned to Chicago on Tuesday, the 19th of August. The defendant testified that they went to Kentucky on Sunday, the 16th of August, stayed there a week and returned to Chicago the following Sunday, August 23rd; that during the week the plaintiff sought employment at several places, but being unable to find employment he told the defendant that they were going back to Chicago; that the defendant intended to remain in Kentucky and had no intention of violating the laws of Illinois; that at the time the plaintiff had expressed himself as having the same intention. Defendant further testified that while in Kentucky she had consulted a priest of the Catholic Church and he told her that it would be necessary for her to get baptismal certificates from Chicago before he could perform the marriage; that after their return to Chicago they both went to see a Catholic priest who discussed with them the marriage in Kentucky and their intentions when they went to Kentucky, and told them that after the presentation of their baptismal certificates he would apply to the Archbishop of Chicago for a dispensation, which dispensation was granted, and they were married in a church ceremony on September 7, 1941.

1. The first part of the report is a general introduction to the subject of the study. It discusses the importance of the study and the objectives of the research.

2. The second part of the report is a detailed description of the methodology used in the study. It includes information about the sample, the data collection methods, and the statistical analysis.

3. The third part of the report is a discussion of the results of the study. It compares the findings with the hypotheses and discusses the implications of the results.

4. The fourth part of the report is a conclusion and a summary of the findings. It also includes recommendations for future research.

5. The fifth part of the report is a list of references. It includes all the sources used in the study.

6. The sixth part of the report is an appendix. It includes any additional information that is relevant to the study.

7. The seventh part of the report is a glossary. It includes definitions of the key terms used in the study.

8. The eighth part of the report is a list of figures and tables. It includes all the visual aids used in the study.

9. The ninth part of the report is a list of footnotes. It includes any additional information that is relevant to the study.

10. The tenth part of the report is a list of appendices. It includes any additional information that is relevant to the study.

The defendant was corroborated in her testimony by her father as to the length of time spent in Kentucky, the conversation with Jacobs, and the attempt of the plaintiff to find work in Kentucky.

Mark Jacobs, a disinterested witness, testified that he had talked to the plaintiff in July or the early part of August, 1941; that the plaintiff said that he intended to go to Kentucky and get married, and wanted the witness to go with them to establish a home; that at that time plaintiff intended to go to Paducah, Kentucky, where the mother-in-law of the witness lived, and he told plaintiff that his mother-in-law possibly could find some work for the defendant there; that he wrote to his mother-in-law and talked to her on the telephone and she told him that while they were down there they could live in her home until they were settled and she would help plaintiff to get a job; that about a week later the plaintiff told the witness that he had decided to go to Louisville instead of Paducah since it was a larger town and he thought there would be greater possibilities there for work; that after plaintiff and defendant returned from Kentucky he talked to the plaintiff and plaintiff said he had come back because he was unable to find a job in Kentucky. The defendant testified that the plaintiff had told her about those conversations with Jacobs in that it was originally their intention to go to Paducah. The plaintiff in rebuttal testified that he knew Jacobs, but denied that he had any conversation about his helping plaintiff get established in

[illegible]

As a result of the above, the following hypotheses were formulated:

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Kentucky, although he knew Jacobs' mother-in-law lived there. The plaintiff also testified that he knew nothing of his wife's visit to a priest in Kentucky and that he did not go with her at the time of her interview with the priest in Chicago.

No brief has been filed in this court by the plaintiff.

The burden of proof was on the plaintiff to show that he and the defendant went to Kentucky not intending to live there, but solely for the purpose of having a marriage performed in Kentucky which could not have been performed in the State of Illinois, and that it was their intention at the time to return to Illinois immediately after the performance of the marriage. In Peaslee v. Glass, 61 Ill. 94, the court said:

"It belongs to the plaintiff to make out a case. The burden of proof is upon him, and where the issue rests upon the sworn affirmation of one party and the sworn denial of the other, both having the same means of information and both unimpeached, and testifying to a state of facts equally probable, a conscientious jury can only say that the plaintiff has failed to establish his claim. Without saying that this court would set aside a verdict for the plaintiff, rendered in such cases, on the ground alone that it was not sustained by the evidence, we must set aside one resting only upon the evidence of the plaintiff when that is contradicted not only by the defendant but also by another witness, and there are no elements of probability to turn the scale."

See also Mareno v. Chicago Transit Authority, 342 Ill. App. 443, and Eilers v. Chicago Transit Authority, 2 Ill. App.2d 233. The plaintiff has failed to sustain the burden of proof which the law places upon him.

THE  
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 CHICAGO  
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The judgment of the Superior Court of Cook County is reversed and the cause remanded to the Superior Court to take further proceedings on the counterclaim of the defendant for separate maintenance.

Judgment reversed and cause  
remanded.

Schwartz, P. J., and Robson, J., concur.

Abstract only.





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47259

PATRICIA GARRISON,

Appellee,

v.

STANLEY L. GARRISON,

Appellant.

A  
16 I.A.<sup>2d</sup> 149

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

MR. PRESIDING JUSTICE SCHWARTZ DELIVERED  
THE OPINION OF THE COURT.

This is an appeal from a decree granting plaintiff a divorce from defendant. The charge in the complaint is adultery committed on or about November 20, 1955, and at other times and places since the marriage, with a person who calls herself Carol D. Garrison.

It appears that plaintiff some time in September 1956 received a hospital bill incurred for the birth of a child. She called defendant, who had gone out of town, and told him about it. According to her testimony, he said he was sorry she had found out about it and that anything she wanted to do was all right; that "she could have the furniture and the boy but leave the car." She spoke to defendant several times and finally told him she would file suit for divorce and that the charge would be adultery. Plaintiff knew that defendant had been seeing a girl named Carol Garcia. She first learned of it about March or May 1956 when she found the name written on a television set repair bill which defendant had in his pocket. She discussed Carol Garcia with the defendant and he told her he had co-signed a loan for



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Carol who was employed in the office where he worked.

Plaintiff's nephew James Ashman testified he often went bowling with defendant and that in September 1955 he, defendant, and one Eugene Saraceno went out at 6:30 p.m. to go bowling; that they went to a rooming house where defendant told him and Eugene not to mention his aunt's name and not to call him "uncle." Defendant went into the building, was gone about 20 minutes, and returned with another person, to whom the witness was introduced. The person was Carol. They all then went bowling. He saw defendant put his arm around Carol and whisper in her ear. He next saw Carol on Christmas Eve 1955 in a restaurant where he went with defendant. The witness had no conversation with her of importance. Defendant said he was going to give Carol a Christmas gift. The gift consisted of money. The witness thought it was \$50. He next saw Carol with defendant at her apartment at Fullerton and Clark streets in January or February 1956. He never saw her after that. He testified he had conversations with defendant concerning Carol and that defendant told him he had been intimate with her; "that he was going to break off with her at the beginning of January." In June or July 1956 defendant told him Carol was pregnant and that he was the father. They went to Carol's sister's house to a baby shower and after that they went to a hospital where defendant told him he was introducing

The first thing I noticed when I stepped out of the car was the cold. It was a sharp, biting cold that seemed to penetrate my very bones. I shivered as I walked towards the entrance of the building, my hands tucked into my pockets. The air was thick with the scent of old books and the faint, distant hum of the city. I had heard that the library was a place of magic, a place where time stood still. But now, as I stood in the doorway, I felt a sense of unease. The silence was oppressive, and the shadows seemed to watch me from the corners of the room. I took a deep breath, trying to steady my nerves. The librarian, an elderly woman with white hair and a kind smile, greeted me warmly. She led me to a small table in the corner, where I was to wait for my appointment. As I sat there, I noticed a small, ornate clock on the wall. The hands of the clock were frozen in time, and the numbers were blurred. I looked at it for a moment, then looked away. The librarian returned with a book, and I opened it. The pages were yellowed with age, and the ink was faded. But as I turned the pages, I felt a strange pull, a sense of being drawn into another world. The words on the pages seemed to come alive, and I found myself reading them with a new kind of intensity. The clock on the wall ticked, and the shadows moved. I knew that I was in a place of power, a place where the boundaries between the real and the imaginary were thin. I closed the book and looked at the librarian. She smiled at me, and I knew that I had found what I was looking for. The journey had begun.

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himself as Carol's brother-in-law and he gave the witness his wallet so that he would not be identified. Later he came out and said "I am a father again. It is a girl;" and that her name is Patricia something-or-other Garrison. After that no other material conversations occurred.

It was stipulated between the parties that Eugene Saraceno would testify to the same effect as the witness Ashman with respect to conversations and events on the evening the witness, defendant, Saraceno and Carol went to the bowling alley, and would further testify that he was dropped off at the corner nearest his home, leaving defendant and Carol alone in defendant's automobile.

Defendant admits the friendship with Carol Garcia, but denies the charge of adultery. His explanation of the events herein set forth appears weak and unconvincing. In any event, the trial court who heard the witnesses found against him, and that finding is amply supported by the evidence. A reviewing court will not reverse a finding of fact by either trial court or jury unless it is against the manifest weight of the evidence. In re: Wojtkowiak, 14 Ill. App.2d 344; Flug v. Craft Mfg. Co., 3 Ill. App. 2d 56; In Re: Matter of Gleeson, 1 Ill. App.2d 409.

Decree affirmed.

McCormick and Robson, JJ., concur.

Abstract only.



47178

ANTOINETTE PTASINSKI,

Appellant,

v.

CHICAGO TRANSIT AUTHORITY,  
a municipal corporation,

Appellee.

16 I.A.<sup>2d</sup> 149

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Antoinette Ptasinski sued the Chicago Transit Authority for personal injuries sustained shortly after 4:00 P.M., on February 9, 1951, when she alighted from a bus at the northeast corner of Belmont and Cicero Avenues in Chicago. The court entered judgment against the plaintiff on the verdict of not guilty and she appeals. Plaintiff maintains that the judgment is against the manifest weight of the evidence.

It was a cold day and a great deal of snow lay on the ground. Plaintiff introduced competent evidence to support her allegation that the defendant by its bus operator, did not provide her with a safe place to alight. She testified that she stepped from the last step of the bus onto hard ice on the curb and fell as she hit the ice. She sustained a fracture of the femur and was in the hospital 47 days. All of plaintiff's witnesses and plaintiff testified that the bus came to a complete stop alongside the curb and did not move again until all of the passengers had alighted. The entire sidewalk was coated with ice and snow except for a small patch which had been cleaned by a drugstore owner. The bus driver

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*Journal of Management Education* 30(6)p. 789-804

Figure 1. Schematic diagram of the experimental setup.

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1. *Journal of the American Medical Association*, 1997; 277: 1033-1038.

*Journal of Management Education* 30(6)p.789-804  
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Figure 2. The effect of the initial concentration of the monomer on the polymerization of *l*-lysine. The polymerization was carried out at 40 °C for 24 h in the presence of 0.05 mol/L of the initiator. The initial concentration of the monomer was 0.05 mol/L. The polymerization was carried out in the presence of 0.05 mol/L of the initiator.



testified that he stopped the bus at the proper place just east of the newsstand. He had no memory of stopping at a mound of ice. A witness for the plaintiff testified that when the passengers left the bus the driver shut the door and "off he went." The defendant states that the bus driver did not know of any injury to anyone who got off the bus and that it was a "blind case." The defendant introduced testimony in support of its position that after a proper stop alongside the curb the plaintiff alighted from the bus and took several steps before she fell, due to ice which had accumulated over the sidewalk, a condition prevalent throughout the city. An examination of the transcript of the testimony convinces us that there is ample support for the judgment. We are not free to reweigh the evidence and set aside a jury verdict merely because the jury could have drawn different inferences and conclusions. Kahn v. James Burton Co., 5 Ill. 2d 614, 623.

Plaintiff urges that the trial judge erred in instilling in the minds of the jury the thought that plaintiff should not recover. She points out that twice during her attorney's argument to the jury the trial judge walked off the bench and that he was unaware of this action by the judge. Nothing objectionable occurred during the judge's absence. In our opinion the fact that the judge left the bench during the argument of plaintiff's counsel did not prejudice the plaintiff. We cannot agree with the further assertion of the plaintiff that in her rulings the trial judge showed favoritism to defendant.



Plaintiff states that the court erred in overruling her objections to the testimony of Dr. Roman Kozakiewicz, a physician, who was called as a witness by the defendant. He testified that he was an interne at the hospital where plaintiff was brought on a stretcher immediately after her injury and that part of his duties was the taking of a history from the patient. Defendant's Exhibit No. 1 for identification was shown to him and he testified that he made up the history sheet. He first took notes from the patient, then dictated into a dictaphone and the material was typed and returned to him for correction. He checked and corrected it and then signed it. After it was corrected and signed it was attached to the record and became a permanent record of the hospital. He interned in the hospital for two years and took six to eight histories a day. He said that the history sheet did not refresh his recollection. To the question: "Was that recorded in the ordinary course of your business?" he answered: "I hope so." He also answered that he made up the history sheet and that the signature and corrections are in his handwriting. To the question: "Can you recall, and was that history that you obtained at that time correct as given by the patient?" he answered: "Yes." Over objection the witness stated that on the basis "of this history the patient fell while walking on the sidewalk near Cicero and Belmont. After she fell she observed a pain in the right hip and could not get up."

The case of Wright v. Upson, 303 Ill. 120, relied upon by the plaintiff, is not applicable to the factual situation



of the instant case. It has been held that where a writing has been made by a witness at the time of the fact for the purpose of preserving the memory of it, if at the time of testifying he can recollect nothing further than that he had accurately reduced the whole transaction to writing, the writing itself may be admitted in evidence to go to the jury. People v. Greenspawm, 346 Ill. 484, 493; cases there cited. People v. Harrison, 384 Ill. 201, 206; Marshall v. Metropolitan Life Ins. Co., 405 Ill. 90, 96. Plaintiff says that the latter cases are inapplicable because defendant's Exhibit No. 1 for identification was not offered or received in evidence. The transcript does not indicate that this point was made during the trial. The objection by the plaintiff's attorney was that the statement was not in the handwriting of the witness. During the cross-examination of the witness there was no question raised as to the authenticity of the history or that it was taken in the usual course of business. The witness did not attempt to testify on the basis that his memory had been refreshed by the record. He testified only as to the contents of the record. We are of the opinion that the court did not err in permitting Dr. Kozakiewicz to state that the plaintiff told him at the time of her admission to the hospital that while walking on the icy sidewalk she fell.

Plaintiff asserts that the court erred in giving numerous instructions for the defendant. These instructions were in response to instructions tendered by the plaintiff and presented to the jury the defendant's theory of the case.



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There was no error in giving instruction No. 20 which told the jurors that while the law permits the plaintiff to testify on her own behalf, nevertheless they have a right in weighing her evidence and determining how much credence is to be given to it, to take into consideration that she is the plaintiff and is naturally interested in the result of the suit. Plaintiff says that the giving of that instruction, considered in connection with the "favoritism" shown to the defendant, told the jury that plaintiff must be lying. We have held that the record does not show favoritism to either party.

Plaintiff states that the court erred in giving defendant's instruction No. 21 on the mode of impeaching a witness on a material point without defining the material point. Neither party submitted an instruction defining the issues. However, all the instructions, when taken as a series, define the material issues to be determined by the jury. There was no error in giving this instruction. Plaintiff presents seven criticisms of defendant's instruction No. 22. Under the facts and all the instructions the plaintiff was not harmed and the court did not err in giving this instruction. We do not believe that the court erred in giving defendant's instruction No. 23 on the subject of contributory negligence. The omission of the words "if any" after the words "contributory negligence," when read in context, would not mislead the jury. Defendant's instruction No. 23 should be considered with plaintiff's instruction No. 9, which submitted to the jury the question whether the plaintiff suffered damages by

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For the first two cases, the  $\mathcal{L}_1$  norm of the difference between the true and estimated parameters is bounded by  $O_p(n^{-1/2})$ , while for the third case, the  $\mathcal{L}_1$  norm is bounded by  $O_p(n^{-1/4})$ . The  $\mathcal{L}_2$  norm of the difference between the true and estimated parameters is bounded by  $O_p(n^{-1/2})$  for all three cases. The  $\mathcal{L}_\infty$  norm of the difference between the true and estimated parameters is bounded by  $O_p(n^{-1/2})$  for the first two cases, while for the third case, the  $\mathcal{L}_\infty$  norm is bounded by  $O_p(n^{-1/4})$ .



reason of physical pain and suffering, if any, which were the proximate result of the occurrence. The plaintiff also criticizes defendant's instruction No. 23 because it omits the words "at or prior to" the occurrence. Without the omitted words the instruction is ~~more~~ favorable to the plaintiff. The fourth clause of the instruction states that the plaintiff must prove by a preponderance of the evidence that "such negligence, if any, was the proximate cause of plaintiff's alleged injuries in question." Instruction No. 23 defines "proximate." The objections voiced by plaintiff to instruction No. 24 are without merit.

Plaintiff complains of defendant's instruction No. 25 which told the jury that if they believe from the evidence that plaintiff had alighted in safety upon the ground and fell by reason of some other cause than the operation of defendant's bus and without negligence on the part of defendant, to find the defendant not guilty. Plaintiff's given instruction No. 8 told the jury that if they believed from the evidence that the defendant stopped its bus for passengers at a place which was unsafe and dangerous for passengers to alight, and that as a result thereof the plaintiff was injured while in the exercise of due care for her own safety, the defendant would be liable. Defendant's instruction No. 25 expressed the defendant's theory of its defense. The court did not err in giving this instruction. Finally, plaintiff states that the court erred in giving instruction No. 27 that sympathy for the injuries and disabilities of the plaintiff should not influence



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their verdict. Plaintiff says the instruction is erroneous in that it limits the question of sympathy to the plaintiff, citing Rogers v. Mason, 345 Ill. App. 560. The court in Keller v. Menconi, 7 Ill. App.2d 250, pointed out that the Rogers case was not reversed because the instructions pinpointed the plaintiff, but because of more serious error discussed in the opinion. We do not feel that the jury was prejudiced by the instruction.

Holding these views the judgment of the Circuit Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

FRIEND and BRYANT, JJ., CONCUR.

ABSTRACT ONLY.

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47223

ELSIE PICK,

Appellee,

v.

IRVING PICK,

Appellant.

16 I.A. <sup>20</sup>150

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

MR. JUSTICE BRYANT DELIVERED THE OPINION OF THE COURT.

This litigation is between Elsie Pick, a married woman, and Irving Pick, her husband.

The original complaint, filed on April 25, 1956, was in two counts and was entitled: "Complaint for Separate Maintenance and Complaint at Law." It made Irving Pick and Patricia O. Gordon, with her numerous aliases, defendants. The first count alleged, inter alia, that Elsie Pick and Irving Pick were married in New York on May 29, 1954; that no children were born or adopted; that on or about May 4, 1955 Irving Pick deserted Elsie Pick without cause, reason or provocation, and that since that time they have been living separate and apart; that subsequent to that separation, since about July, 1955, defendant Irving Pick has been living in open and notorious adultery in the City of Chicago with Patricia O. Gordon, and that by virtue of this relationship all attempts at reconciliation of the plaintiff with the defendant Irving Pick are foiled by the defendant Patricia O. Gordon. Allegations are also made as to the earning capacity of Irving Pick, but no allegations of any kind or nature are made as to the property or obligations of Irving Pick. In the first count



the plaintiff prayed for a decree of separate maintenance; that she be awarded a reasonable sum for temporary alimony and a final amount at the final hearing, and for attorney's fees, and that injunctive relief be granted against both Irving Pick and Patricia O. Gordon.

In the second count the plaintiff makes the same allegations in regard to the marriage, the desertion and relationship with Patricia O. Gordon, and in this count complains only about Patricia O. Gordon. She alleges that but for the interference of Patricia O. Gordon, she and her husband would have been reconciled, and that Patricia O. Gordon has contrived wickedly and maliciously to keep her from the society of her husband, and prays for a judgment of \$100,000 against Patricia O. Gordon and a finding that malice is the gist of the action.

On January 22, 1957 the court entered the following order, containing findings of fact:

"This cause coming on to be heard for trial on the plaintiff's complaint for Separate Maintenance and upon the defendant's denial thereto, and the said parties being personally present in open court and being represented by their respective counsel, and the court having considered the said pleadings and having heard the testimony adduced in open court by and in behalf of the respective parties under oath, and having heard the arguments of counsel, and being fully advised in the premises, the court Does Find:

1. That it has jurisdiction of the parties hereto and the subject matter hereof;

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5. That the plaintiff has failed to prove the charges in her complaint against the defendant by a preponderance of the evidence;

6. That the plaintiff, Elsie Pick, during the course of the marriage, loaned to the defendant the sum of \$5,000, upon which loan the defendant has repaid the sum of \$1,500, leaving a balance owing to the plaintiff by the defendant in the sum of \$3,500.00.





Wherefore, It Is Hereby Ordered, Adjudged and Decreed:

1. That the relief sought by plaintiff for a Decree of Separate Maintenance be, and the same is hereby denied, and that her complaint herein be, and the same is hereby dismissed for want of equity;

2. That the plaintiff's prayer for attorney's fees be, and the same is hereby denied, she having failed to sustain the equities in this case;

3. That the defendant, Irving Pick, shall repay to the plaintiff, Elsie Pick, the sum of \$3,500.00, payable at the rate \$125.00 per month commencing on February 1. 1957, until such indebtedness is paid;

4. The court notes by this order that the plaintiff hereby enters her objections to this order of court dismissing her complaint.

5. The court also notes that the defendant objects to that part of the order finding that he is obligated to repay the plaintiff the sum of \$3,500.00.

It Is Further Ordered that the defendant shall have judgment for costs of this suit."

It is to be noted that finding 6 in that order is the first mention in the record of any money having been loaned by the plaintiff to the defendant at any time under any circumstances. It is further to be noted that the relief requested by the plaintiff in Count 1, for separate maintenance, was denied.

On that same day, January 22, 1957, Count 3 of the complaint was filed, which is as follows:

"1. That on or about, to-wit, June 1st, 1954, at the request and instance of the defendant, she loaned to him the sum of \$5,000, which he received and accepted as a loan and then and there promised to repay to her within a reasonable time.

2. That since said time he has repaid to her the sum of \$800.00, and that there is now due and owing from the defendant to the plaintiff the sum of \$4,200.00.

3. That she has since said time requested the defendant to pay the said amount to her, which he has so far steadfastly refused to do, and that there is now due and owing to her from the defendant the sum of \$4,200.00.

4. That the defendant, by refusing to pay the same, has been guilty of vexatious delay, and he should be obligated to pay interest upon said sum so due, in accordance with the statute in such case made and provided.

Wherefore, plaintiff prays judgment against the defendant for the sum of \$4,200.00, plus interest."



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It is apparent that this Count 3 clearly sounds in law for money loaned and not repaid, and that the amount alleged in Count 3 as having been repaid, and the balance due, differ from the findings in the order entered simultaneously therewith, and that that order does not provide for a money judgment in the usual form but declares a certain amount due and prescribes a method of repayment.

On the same day, January 22, 1957, an order was entered allowing the defendant Irving Pick time in which to plead, which is as follows:

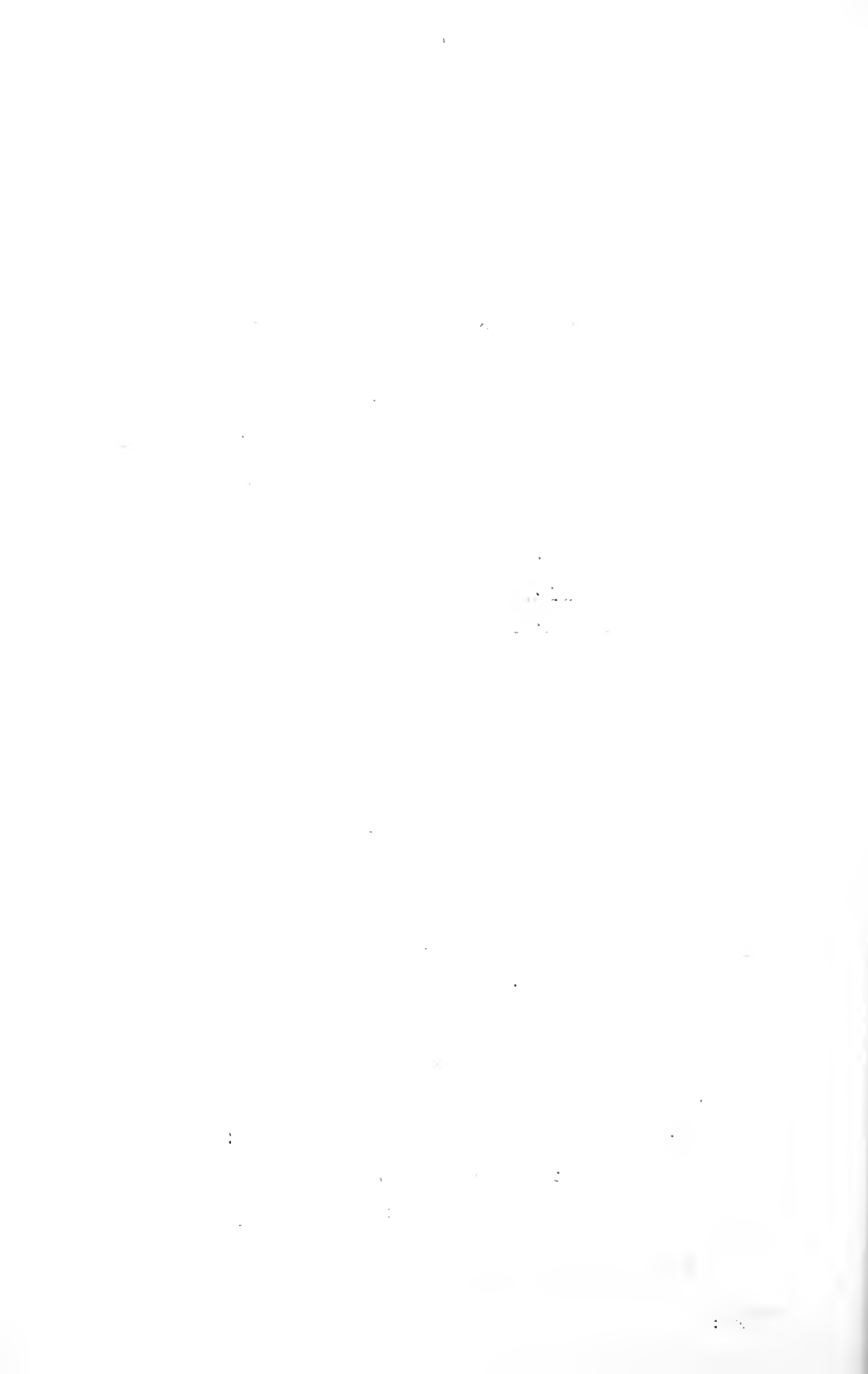
"It is hereby ordered that the defendant, Irving Pick, may answer or otherwise plead within 5 days to any amended complaint filed by the plaintiff."

Within the time allowed by the order, that is, on January 26, 1957 (the decretal order having already been entered on January 22, 1957), the defendant filed a motion to strike Count 3 from the complaint and dismiss the same, alleging:

"This lawsuit is a lawsuit for separate maintenance and the matters alleged in Count 3 are improperly brought before the court and the court has no right to consider such matters."

On February 14th defendant filed his motion to amend the order of January 22, 1957, alleging that that portion of the order awarding the sum of \$3,500 to the plaintiff should be vacated "for the reason that the court had no jurisdiction to adjudicate property rights of the parties in this, a separate maintenance, action."

On February 15, 1957, the court entered the following order:



"This cause coming on to be heard on the motion of the attorney for the defendant and having been set for this day for hearing and all parties being represented by counsel and the court having heard the arguments of counsel.

It is hereby ordered that the motion to amend the decree heretofore entered on January 22, 1957 to include the words 'Defendant is now living separate and apart from the plaintiff, Elsie Pick, without his fault' shall be and is hereby denied.

It is further ordered that the motion of defendant to vacate that portion of the order awarding the sum of \$3500.00 to the plaintiff, for want of jurisdiction, shall be and is hereby denied.

It is further ordered that the motion of defendant for leave to file his Complaint for Divorce in the above entitled cause shall be and is hereby denied.

It is further ordered that leave shall be and is hereby granted plaintiff to dismiss Count II of said cause for Alienation of Affections."

It is from this order of February 15, 1957 and the order of January 22, 1957, in so far as both relate to Count 3 of the complaint, that this appeal is taken.

It is to be first noted that the order of January 22nd dismissed the first count of the complaint, relating to separate maintenance, for want of equity, and that the order of February 15th, on the plaintiff's motion, dismissed Count 2 against Patricia O. Gordon for alienation of affections. The only portion of the proceedings left pending by the orders of the trial court is Count 3, relating to the money allegedly loaned by the plaintiff to the defendant and not by him repaid.

The historical distinction between divorce and separate maintenance, as it relates to property rights, is well understood. It is inherent in the distinction between the remedy offered in divorce, which is the termination of the marriage relationship, and necessarily involves the adjustment of all



property rights, and the relief offered in separate maintenance, where the marriage remains in existence--perhaps until death--and the only question is that of support for the parties during their separate residence. McAdams v. McAdams, 267 Ill. App. 124, 131-2.

With the liberal provisions in regard to the joinder of actions (Ill. Rev. Stats. 1955, chap. 110, par. 44) and the filing of amendments in the Practice Act (chap. 110, par. 46), it becomes necessary to keep in mind the essential elements of the causes of action, because none of those matters is changed by the Practice Act.

In the case of Van Dolman v. Van Dolman, 378 Ill. 98, 101, it was held that it was error, where a separate maintenance decree had been entered, to deny the partition of the property belonging to husband and wife jointly because partition was a separate remedy, and if the pleadings stated a cause of action in partition, plaintiff was entitled to exercise that remedy despite the fact that the parties were married and living separate under a separate maintenance decree.

In other cases it has appeared that both parties conferred jurisdiction upon the court because the plaintiff requested that the property rights be equitably determined between the plaintiff and defendant, and the defendant, in effect, in his pleadings, joined in that request and the court took jurisdiction under general equitable powers. Decker v. Decker, 279 Ill. 300; Ribergaard v. Ribergaard, 349 Ill. App. 99. This explanation of Glennon v. Glennon, 299 Ill. App. 13,





and Grossman v. Grossman, 304 Ill. App. 507, has been made by courts and text writers. (See Weinberg, Illinois Divorce, Separate Maintenance and Annulment, sec. 612, page 460, and 22 Chicago Kent Law Review 281.)

It is, however, still the general rule that in this state the courts are without power to adjudicate the property rights of the parties in separate maintenance matters. Petta v. Petta, 321 Ill. App. 512; Olmsted v. Olmsted, 332 Ill. App. 454; Milewski v. Milewski, 351 Ill. App. 158.

It is not necessary here to discuss the problem of "general equity powers" which are not a part of a cause of action in equity, either statutory or otherwise, and which are not auxiliary thereto, because it is clear that Count 3 does not rest on Count 1--the separate maintenance count--where relief was denied to the plaintiff, but rests independently upon a purported cause of action arising out of the lending of money and the failure to return it, which sounds at law, entirely independent of the marital relation, and Count 3 does not call for an adjustment of property rights. The parties in Count 3 are the same as the parties in Count 1, and joinder of the counts is proper and the amendment is within the terms of the statute. (Ill. Rev. Stats, 1955, chap. 110, pars. 44 and 46.)

It is clear, however, that the order entered in regard to the amount claimed, is not the proper form of judgment for a count sounding in law such as we have indicated. It is also equally clear that as long as Count 3 was filed



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simultaneously on the same day as the order of January 22, 1957, and as Count 3 sounds in law and raises new questions of fact which had not theretofore been at issue, Count 3 was not at issue and the defendant was not in default in that he had been given no opportunity to plead, and that the court was therefore without jurisdiction to enter a judgment order finding an amount due upon Count 3, although it had general jurisdiction of the subject matter.

The finding of the lower court will be reversed and that part of the order of January 22, 1957 awarding the plaintiff the sum of \$3500, and that part of the order of February 15, 1957 denying the motion to vacate that portion of the order of January 22nd awarding \$3500 to the plaintiff for want of jurisdiction, will be reversed and the cause will be remanded with directions to proceed to trial on the merits in accordance with this opinion upon Count 3 of the complaint.

REVERSED AND REMANDED  
WITH DIRECTIONS.

BURKE, P. J., and FRIEND, J., CONCUR.

ABSTRACT ONLY.



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47283

GERALD C. ELLICK,

Appellee,

v.

CLAYTON MOTOR COMPANY, INC.,

Appellant.

161.A.<sup>2d</sup>151

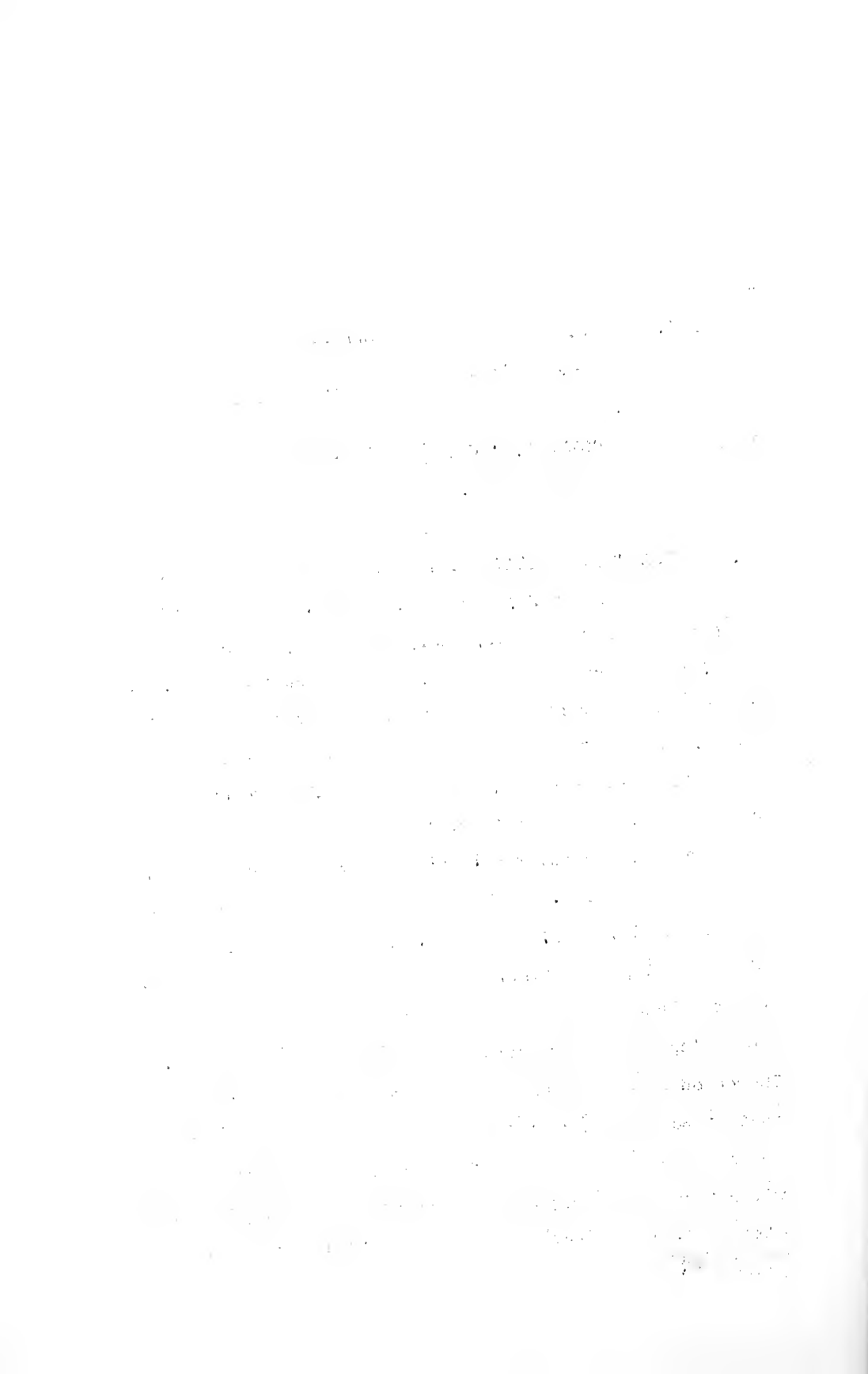
APPEAL FROM

CIRCUIT COURT

COOK COUNTY

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The plaintiff, Gerald C. Ellick, had judgment against Clayton Motor Co., Inc., before a justice of the peace, for money due and owing, in the amount of \$310.24, from which defendant appealed to the Circuit Court of Cook County. There it filed a jury demand, and later, by leave of court, a counterclaim, which plaintiff answered. The matter was originally set for trial January 23, 1957 but, as appears of record, was three or four times continued, on motion of plaintiff. When the matter finally came on for trial April 15, 1957, defendant, by its attorney, after duly notifying plaintiff, requested a two-day continuance on the ground that its principal witness was in Arizona recovering from major surgery. This motion was denied. Thereupon defendant answered "Ready for trial," stating that it would proceed without such witness. The court denied defendant the right to proceed to immediate trial without said witness, ordered its appeal and counterclaim dismissed, and directed the clerk to issue a writ of procedendo.



Defendant's appeal assigns first as ground for reversal the refusal of the court to grant a continuance for two days because of the illness of its principal witness. Rules 22 (5) and 26 of the Circuit Court provide in effect that when a cause, appearing on the trial calendar, is reached for trial and a continuance is sought, the moving party shall present an affidavit showing that the material witness is not available and that his testimony would be material to the issues, and requiring that the party recite generally the facts to which such witness would testify if available. This rule was not followed, and accordingly we are constrained to hold that the denial of the motion of continuance was properly within the discretion of the court.

However, when defendant, by its counsel, apprised the court that it was ready for trial without the witness, the court's denial of defendant's right to be heard, if only for the purpose of confronting and cross-examining the adverse party's witnesses, deprived defendant of its right to a trial.

Accordingly, the judgment of the Circuit Court is reversed, and the cause remanded with directions for a trial on the merits.

JUDGMENT REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS.

BURKE, P. J., and BRYANT, J., CONCUR

ABSTRACT ONLY

1. The first part of the document discusses the importance of maintaining accurate records of all transactions and activities. It emphasizes that this is essential for ensuring transparency and accountability in the organization's operations.

2. The second part outlines the specific procedures for recording and reporting data. It details the steps involved in data collection, analysis, and the frequency of reporting to the relevant stakeholders.

3. The third part addresses the challenges associated with data management and provides strategies to overcome them. It highlights the need for robust security measures to protect sensitive information from unauthorized access.

4. The fourth part discusses the role of technology in enhancing data management processes. It explores various software solutions and tools that can streamline data collection, storage, and analysis.

5. The fifth part focuses on the importance of training and education for staff members. It stresses that all employees must be well-versed in the organization's data management policies and procedures to ensure consistent and accurate data handling.

6. The sixth part provides a summary of the key points discussed in the document. It reiterates the commitment to maintaining high standards of data integrity and the importance of continuous improvement in data management practices.

7. The final part of the document includes a list of references and a glossary of terms. This section is designed to provide additional context and clarify any technical terminology used throughout the document.



A

47294

STRATFORD TELEVISION COMPANY,  
an Illinois corporation,

Appellee,

v.

MULTI-TRON LABORATORY, INC.,  
an Illinois corporation,

Appellant.

16 I.A.<sup>2d</sup> 151

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Stratford Television Company, a corporation, brought suit against Multi-tron Laboratory, Inc., to recover the price of three television sets of the aggregate value of \$319.00. Defendant answered and also filed a counterclaim for \$466.20 for merchandise claimed to have been sold by defendant to plaintiff. In its verified answer defendant averred that it had never purchased the television sets from plaintiff, but that its dealings were with two individuals, E. E. Arkin and Paul A. Janusch; that early in May 1956 either Arkin or Janusch telephoned defendant, requesting that it issue its check to Stratford Television Company in payment of the \$319.00 claimed to be due; that defendant advised the caller that it would issue its check on condition that either Arkin or Janusch simultaneously issue a check payable to defendant in the amount of \$466.20 claimed to be due defendant; that defendant's check for \$319.00 was delivered by messenger, who was advised that the check claimed to be due defendant was not then available but would be mailed later that day; and that in the circumstances defendant stopped payment on the \$319.00 check for which



-2-

this suit was brought. Successive motions of counter-defendant to strike and dismiss the counterclaim and defense were denied, and the cause was then set for hearing on May 13, 1957. When called, defendant's counsel answered that, although his client and witnesses were not in the courtroom at the time, he had talked to them a day or two earlier, and at that time they had informed him they would be ready for trial on the scheduled hearing date. He then left the courtroom to answer calls elsewhere; during his absence from the courtroom he was advised by one of his associates that two witnesses for defendant had telephoned his office to notify him that they were confined at home with virus infections and under medical care and could not be in court that morning, but that they would be available in a few days and asking for a short continuance. Later in the forenoon defendant's counsel apprised the trial judge of the circumstances and asked for a continuance, to which plaintiff's counsel objected. The court ordered the case to proceed to trial "at least as to Plaintiff's statement of claim, and we can reset the hearing on the counterclaim to some date in the fall." Defendant then asked that plaintiff's witnesses be sworn to testify in support of plaintiff's claim so that defendant might cross-examine. When plaintiff objected to this procedure, the trial judge directed the clerk to enter on the half-sheet in the case an order finding the issues on its statement of claim for plaintiff and against defendant in the sum of \$319.00 and costs, and directing that judgment



be entered on the finding and execution issue. The trial judge then reset the counterclaim for hearing on October 17, 1957. On June 7, 1957, within thirty days from the date of the judgment order, defendant filed its motion and petition for a new trial which was denied. Defendant appeals. Plaintiff filed no brief but participated in the oral argument.

The judgment entered in favor of plaintiff was as of default, notwithstanding the fact that defendant had a meritorious affidavit of defense and counterclaim on file, as indicated by the denial of plaintiff's motion to strike these pleadings. Defendant was entitled to have plaintiff's witnesses sworn and to cross-examine them for the purpose of showing, if it could, that the facts set out in its affidavit of defense were true, and to adduce documentary evidence which plaintiff's counsel had been notified to produce on the hearing. Under the procedure followed, there was no trial. Plaintiff had judgment without proving its case and without allowing defendant to adduce evidence in support of its defense and counterclaim. Plaintiff's judgment, upon which execution had been ordered, was final and appealable. Section 50 (2) of the Civil Practice Act (Ill. Rev. Stat. 1957, ch. 110) does not apply to the circumstances of this proceeding. Defendant is entitled to a trial to defend against plaintiff's claim and to adduce evidence on its counterclaim.

Accordingly, the judgment of the Municipal Court is



-4-

reversed, and the cause remanded with directions to proceed to a trial of the issues made up by the pleadings.

JUDGMENT REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS.

BURKE, P. J., and BRYANT, J., CONCUR.

ABSTRACT ONLY.





FILED

IN THE

16 I.A. 152

APPELLATE COURT OF ILLINOIS

JAN 24 1958

SECOND DISTRICT, SECOND DIVISION

PAUL V. WUNDER

OCTOBER TERM, A. D. 1957

GERALDINE FRY and GEORGE FAMIGHETTE,

Plaintiffs-Appellees,

vs.

HOBSON DRUG CO., a Corporation Au-  
thorized To Do Business in Illinois, and  
HANNAH KAMPIKE,

Defendants.

Appeal from the  
Circuit Court of  
Winnebago County.

LEE H. HOBSON and ADLYN HOBSON,  
Partners d/b/a HOBSON DRUG  
COMPANY,

Certain Defendants-Appellants.

CROW, P. J.

This is an action by two plaintiffs, Geraldine Fry and George Famighette, against the defendants Lee H. Hobson and Adlyn Hobson, partners d/b/a Hobson Drug Company, and Hannah Kampike, for personal injuries alleged to have been sustained as a result of eating unwholesome food, namely, ham salad sandwiches at the luncheonette in the Hobson Drug Co. Store, Rockford, Illinois, April 9, 1956. The case was tried before a jury which found the three defendants guilty, and assessed damages in favor of both plaintiffs, which verdicts were afterwards amended by the Court in certain formal respects.

There is a very faint, illegible document visible through the paper, which appears to be a form or report with several lines of text and possibly a signature at the bottom.

As amended, the Court entered judgments thereon for \$536.00 in favor of the plaintiff Fry and \$470.85 in favor of the plaintiff Famighette against all the defendants, and denied the appellants' post trial motion for new trial and in arrest of judgment. The defendants Lee H. Hobson and Adlyn Hobson, partners d/b/a Hobson Drug Company, appeal. There is no appeal by the defendant Hannah Kampike. The Court had previously during the trial considered and denied the defendants-appellants' motions for directed verdicts.

The defendants-appellants' theory is that there is not sufficient or substantial evidence tending to support the verdicts of the jury against them. There are no questions on the pleadings, no contention that the judgments are unreasonable or excessive in amount, no complaint as to any instructions, or that the facts in evidence do not warrant a finding that the plaintiffs were injured by the consumption of food bought and eaten at the store.

The amended complaint contained three counts in favor of Geraldine Fry, the first against Lee H. Hobson and Adlyn Hobson, partners d/b/a Hobson Drug Company, the second against Hannah Kampike, and the third against all three defendants, alleging they were engaged together in operating the luncheonette. Counts IV, V, and VI were respectively the same as Counts I, II, and III except they were in behalf of the other plaintiff, George Famighette.

The substance of the amended Count VI in behalf of the plaintiff George Famighette, and the amended Count III in behalf of Geraldine Fry, is that on the 9th of April, 1956 the

The Department of the Interior, Bureau of Land Management, is the lead agency for the management of the National System of Public Lands. The Department of the Interior, Bureau of Reclamation, is the lead agency for the management of the National System of Water Resources. The Department of the Interior, Bureau of Indian Affairs, is the lead agency for the management of the National System of Indian Lands. The Department of the Interior, Bureau of Fish and Wildlife Management, is the lead agency for the management of the National System of Fish and Wildlife Resources. The Department of the Interior, Bureau of Geographical Names, is the lead agency for the management of the National System of Geographical Names. The Department of the Interior, Bureau of Land Management, is the lead agency for the management of the National System of Public Lands. The Department of the Interior, Bureau of Reclamation, is the lead agency for the management of the National System of Water Resources. The Department of the Interior, Bureau of Indian Affairs, is the lead agency for the management of the National System of Indian Lands. The Department of the Interior, Bureau of Fish and Wildlife Management, is the lead agency for the management of the National System of Fish and Wildlife Resources. The Department of the Interior, Bureau of Geographical Names, is the lead agency for the management of the National System of Geographical Names.

defendants Lee H. Hobson and Adlyn Hobson, doing business as the Hobson Drug Company, and Hannah Kampike, were engaged in operating a restaurant or lunch room or luncheonette in the premises located at 132 North Church Street, Rockford; that the plaintiffs entered the premises as patrons, and there ordered, received, paid for, and consumed ham salad sandwiches furnished by the Hobson Drug Company and Hannah Kampike, which were allegedly unwholesome and unfit for human consumption, thereby causing them to become ill and to be confined to a hospital.

There is, of course, an implied warranty upon a restaurant keeper or purveyor of food to the public that the food he serves and sells his patrons is wholesome and fit to be eaten, and he will be liable if it proves otherwise, whether he was negligent or not: DUNCAN v. MARTIN'S RESTAURANT, INC. (1952) 347 Ill. App. 183.

The evidence indicates that the plaintiff Geraldine Fry purchased and consumed a ham salad sandwich in the luncheonette on April 9, 1956. Shortly thereafter she became ill, was hospitalized, had some medical treatment, and lost some work. The facts as to the plaintiff George Famighette are substantially similar. Certain other people, who testified as witnesses, had suffered similar experiences. When complaint was made that afternoon about the food Mrs. Hobson first contacted the City Health authorities and they came to the place the next morning and Mrs. Kampike gave them a sample of the ham salad for testing purposes.

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The lunch counter or luncheonette was a part of the Hobson Drug Company store, covering about one-half of the premises. The only sign on the exterior or interior of the store, indicating anything about the proprietorship, was "Hobson Drug Company". There are two entrances which lead to the drug store and luncheonette. The Hobson Drug Company at the time material to the case was a partnership, consisting of Lee H. Hobson and Adlyn Hobson.

Prior to January 1, 1956, one Bob Brite and Billie Brite operated the luncheonette under a lease from the Hobsons. Hannah Kampike, one of the present defendants, worked for the Brites at that time. Apparently the Brites gave up their lease, and subsequently Hannah Kampike undertook to run the luncheonette after January 1, 1956 under an informal, oral arrangement whereby she was to do the cooking, serving, and hiring and firing of help, and was to pay for the same. She opened up a bank account in her name and her husband's name, but her husband had nothing to do with the business. Hannah Kampike evidently was to do this on a temporary basis, without any written lease or any other written agreement, but under an oral agreement with the Hobsons by which she was to pay them 10% of the profits. She said she had high blood pressure and had told Mrs. Hobson she would not take a chance on taking it on a lease arrangement on account of her high blood pressure. Mrs. Kampike variously said she was sharing what she was taking in, that Hobson Drug Co. got 10% of what she made, that she paid 10% of the gross weekly, and that the Hobsons got 10% of her receipts. This was apparently paid each week. Mrs. Hobson checked the receipts each night. The Hobsons owned all the fixtures and equipment used in the operation. The plaintiffs and some six other witnesses who





testified they ate at the luncheonette and suffered experiences similar to the plaintiffs on the date concerned all referred to the place at which they were eating as Hobson's Drug Store, or Hobson Drug Co., or Hobson's.

Neither of the defendants-appellants testified on their own behalf. Adlyn Hobson was called as a Court's witness but her testimony was confined to relating the status of the Hobson Drug Company as a corporation and as a partnership.

The plaintiffs-appellees' theory is that the three defendants, namely, the two Hobsons and Hannah Kampike, were operating the luncheonette together as a joint operation and all three were liable for the plaintiffs' damages. On the other hand, the defendants Hobson contend that Hannah Kampike leased the premises, that is, the space, fixtures, and equipment, from the Hobsons for which she paid rent; that the rental was 10% of the gross sales; that she alone managed the business, did the buying, managed the cooking and selling, was the sole employer of the help, paid their wages, paid the Social Security taxes, and income withholding taxes, and made the necessary unemployment contributions, and they urge that, by reason of these facts, the Hobsons were not the operators, and there could be no valid judgment against them or against all three defendants. It is true that at various points in her testimony, though frequently in response to rather leading and suggestive questions, Mrs. Kampike said, in effect, - it was all mine; she let me run it my own self until she got someone; I ran the lunch part of it myself; I took over the same lease (as Brites had had) when they left; I ran the place; Mrs. Hobson's 10% was for rental of the

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space and use of the equipment; I managed it completely; and Mr. and Mrs. Hobson had nothing to do with it. To the extent those comments of Mrs. Kampike constitute merely legal conclusions or opinions they can, of course, have no weight, and to the extent they may be inconsistent with other parts of her testimony it was for the jury to determine what the facts were.

We have carefully reviewed the evidence and are of the opinion that, under the circumstances, the view of the defendants Hobson is untenable, particularly considering the physical arrangement of the luncheonette as a part of the Hobson Drug Company store, its size, the sign "Hobson Drug Company", the arrangement between the Hobsons and Mrs. Kampike, the absence of any written lease or other written agreement, the payment of 10% of the profits to the Hobsons, Mrs. Hobson's checking the receipts regularly, their ownership of the fixtures and equipment, Mrs. Kampike's devotion of her services, Mrs. Hobson's contacting the City Health authorities, the belief of the plaintiffs and six other patrons that they were eating at Hobson's Drug Store, and the failure of either defendant-appellant to testify on their own behalf. We believe the jury could reasonably find, under all the evidence and inferences and reasonable inferences therefrom, that this was a joint adventure. A joint adventure is an association of two or more persons to carry out a single enterprise for profit, without any actual partnership or corporate designation. An agreement to share losses is not necessary to constitute a joint adventure, - the test is sharing in the profits. A joint adventure may be established without any specific formal agreement to enter into a joint enterprise.



It may be implied from facts and circumstances in evidence, showing such an enterprise was in fact entered into. If a joint enterprise be proved either by direct evidence of a mutual agreement, or by proof of facts and circumstances from which it is made to appear that such enterprise was entered into, the law fixes the rights of the parties. A joint adventure has, in general, the legal incidents of a partnership, and, though not identical with a partnership the relation of the parties is so similar that their rights and liabilities are usually tested by the rules governing partnerships: DITIS v. AHLVIN CONSTRUCTION CO. et al. (1951) 408 Ill. 416; HAGERMAN v. SCHULTE et al. (1932) 349 Ill. 11; HARMON et al. v. MARTIN et al. (1947) 395 Ill. 595; PARISH v. BAINUM et al. (1923) 306 Ill. 618. The members of the joint enterprise are jointly and severally liable, the same as partners: WALLACE et al. v. BUCKINGHAM (1890) 38 Ill. App. 516; SLATER et al. v. CLARK and CO. (1896) 68 Ill. App. 433.

While the plaintiff Famighette's amended Count VI and the plaintiff Fry's amended Count III did not seek to place a legal definition or label on the relationship of the Hobsons with Hannah Kampike, yet the substantive matter which they pleaded, and for which they contend, and the proof adduced, indicate that they intended to charge the three defendants with engaging jointly in a single enterprise. There are sufficient allegations of ultimate fact to that effect, and, of course, it was not necessary and would have been improper pleading for them to plead legal conclusions. The proof, under the pleadings, could reasonably justify a jury in believing that the three defendants were engaged in this enterprise for their joint profit. That there was



apparently no agreement to share the losses, if any, is immaterial to the creation of a joint adventure.

Moreover, persons may be joint adventurers (or partners) as to third parties and brought within all the liabilities of such relationship as to such third parties even though they may not necessarily be joint adventurers as between themselves. When the issue is whether parties are, as between themselves, joint adventurers, it may be important to consider whether all of the essential elements of the relationship exist and strict accuracy in attempting to define the relationship may be important. But such a degree of strictness is not essential where a third party, an outsider, is endeavoring to establish that other persons are liable to him as joint adventurers: DAUGHERTY et al. v. HECKARD et al. (1901) 189 Ill. 239. If a party by his actions and conduct holds himself out as, and represents to the public and the plaintiff third party that he is, the proprietor and operator of a certain facility located within and apparently a part of his store, and the plaintiff believes he is in fact conducting that facility and has no notice or knowledge it is conducted by anyone else, that party is responsible as to the plaintiff third party for the conduct of the actual proprietor and operator of the facility: CORNWELL v. LEITER BUILDING STORES, INC. (1930) 259 Ill. App. 460. Cf.: BURKE v. PIPER'S SUPER SERVICE STATIONS (1942) 312 Ill. App. 656.

The cases cited by the defendants-appellants, THE TRUST COMPANY, etc. v. SUTHERLAND HOTEL COMPANY (1945) 389 Ill. 67, WALKER et al. v. HAUCHEY et al. (1886) 25 Ill. App. 135,

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED



SAVAGE v. STEWART (1922) 226 Ill. App. 388, NAUGHTON et al. v. TRUSTEES SYSTEM etc. (1950) 341 Ill. App. 301, STATE BANK etc. v. BROWN et al. (1931) 263 Ill. App. 312, SENGO v. BLOCH et al. (1931) 263 Ill. App. 198, and FREDRICH v. WOLF et al. (1943) 383 Ill. 638, have been considered, but are not believed to be in point under the circumstances.

We believe the facts would warrant the jury in believing that the defendants Hobson operated the luncheonette together with the defendant Hannah Kampike, that, as to the plaintiff third party, the defendants Hobson were liable, that the verdicts to that effect are not against the manifest weight of the evidence, and that a joint and several liability was thereby established; and hence judgments against all three defendants were correctly entered. That the jury might have found differently is possible, but that is of no particular significance now in view of their verdicts, if there be a reasonable basis in the evidence for what they have found, and we think there is such a reasonable basis. An experienced trial judge considered those same questions upon the defendants-appellants' motions for directed verdicts and their post trial motion and denied the motions. We are not disposed to disagree.

We find no error, and the judgments will, therefore, be affirmed.

A F F I R M E D .

*Wright, J. - Concur*

Solfisburg, J.      Concur

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*[Handwritten signature or initials, possibly "J. Solisburg", written in dark ink.]*

Solisburg, J. Conours

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT, FIRST DIVISION  
OCTOBER TERM, A. D. 1957

16 LA. 153

BENNO HEILERUNN,

Plaintiff-Appellee,

vs.

FANNIE ZUIDEMA,

Defendant-Appellant.

Appeal from the  
County Court of  
Will County

McNEAL, J. -

Plaintiff, Benno Heilbrunn, sued the defendant, Fannie Zuidema, to recover commission as a real estate broker. Plaintiff alleged: that in April, 1954, defendant orally agreed to give him the agency for the sale of her farm and to pay him five per cent of the selling price for his services in procuring a purchaser; that he procured Myrtle Elsenau as a purchaser and showed her the property in April, May and June, 1954; that on or about November 1, 1954, the farm was sold to Miss Elsenau for an amount unknown to the plaintiff but which according to the stamps on the deed, was \$35,000. In her answer defendant admitted that the property was sold to Miss Elsenau for \$35,000, but denied all other allegations in the complaint. On July 6, 1956, the case was tried before the county court without a jury and taken under advisement. Thereafter the county judge wrote to the attorneys for the parties that after due consideration of the facts and evidence presented, judgment had been entered for the plaintiff and against the defendant for \$1750.00 and costs of suit. This appeal followed.

Defendant's theory of the case is that plaintiff was neither employed by the defendant nor was he the procuring cause of the sale

APPELLATE COURT OF THE DISTRICT OF COLUMBIA

IN RE: THE ESTATE OF JAMES H. HARRIS

OCTOBER TERM, 1935

BEFORE THE COURT

THE COURT HAS READ THE

WRITING OF THE

ATTORNEY GENERAL

AND

THE COURT HAS CONSIDERED THE MATTER

AND IS OF THE OPINION THAT THE DECISION OF THE

COURT IN THIS CASE IS AFFIRMED

AND THE WRITING OF THE ATTORNEY GENERAL IS

APPROVED AND THE COURT HAS CONSIDERED THE

MATTER AND IS OF THE OPINION THAT THE

DECISION OF THE COURT IN THIS CASE IS

AFFIRMED AND THE WRITING OF THE

ATTORNEY GENERAL IS APPROVED

AND THE COURT HAS CONSIDERED THE

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OF THE ATTORNEY GENERAL IS

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CASE IS AFFIRMED AND THE

of her farm. Plaintiff's theory is that he was employed to sell the farm; and that the purchaser who ultimately took the farm at a lesser consideration than the original price and authority given by defendant, was procured by plaintiff, but he was prevented from consummating the sale by secret dealing between defendant and the purchaser.

Plaintiff's evidence consisted of the testimony of Miss Elsenau and the parties. Defendant was called under section 60 of the Civil Practice Act and testified: that she first met the plaintiff quite a while after she sold the farm and after she had received a letter from his attorney, dated February 16, 1955, regarding his claim for commission; she had never seen Heilbrunn before that time; she never talked to him in regard to her tenant on the farm or told plaintiff her farm was for sale for \$40,000. Miss Elsenau came to see defendant in the early summer of 1954, and said that the people on a neighboring place had given her defendant's name and address. Miss Elsenau asked defendant if she would sell her farm and defendant told her the farm was not for sale. That was the first time defendant met Miss Elsenau and she had never talked to her on the 'phone before that time. Quite a while thereafter Miss Elsenau called defendant a couple of times, but she was not interested in selling the farm. Her tenant seemed to be doing all right at that time. Later defendant was unable to collect rent from her tenant and was never able to find him at work on the place, and then she decided to sell the farm.

Plaintiff testified: that Vernon Hattendorf told him the Zuidema farm was for sale; he went to defendant's home in February, 1954, and asked her if it was all right for him to show the farm to prospects interested in buying; she asked \$40,000 for the farm; he told her that he was a real estate broker and charged the regular commission and she told him to go ahead and show it. Plaintiff first met Miss Elsenau in the early part of 1954, after he had advertised certain property in the Chicago Tribune. He took her to the farm twice in April and May of 1954, and told her that the selling price was \$40,000. She



was interested in buying and told him to contact the owner with reference to the sale. He saw defendant a second time at her home and she told him that the tenant had a lease for another  $4\frac{1}{2}$  or 5 years. He told Miss Elsenau about the lease and she said she would not be interested in buying defendant's farm with that lease. He sold Miss Elsenau other farm property in Will County on the Lincoln Highway in May or June, 1954. Defendant's tenant told plaintiff he had been forced to move and through that information plaintiff found out that the Zuidema farm had been sold to Miss Elsenau. Thereafter he saw defendant in November, 1954, and asked her if she remembered that he had had her farm for sale and had told her that Miss Elsenau wanted to buy the farm, and defendant would not even talk to him then.

Before plaintiff testified, his attorney stated that he desired to call Miss Elsenau as a court's witness so that he would not be bound by her testimony, but his request was refused. After plaintiff had testified, Miss Elsenau was called as a witness for plaintiff, and testified: that she was engaged in the investment and real estate business--buying and selling on her own account; that she had never been on the Zuidema farm with the plaintiff; that when he drove her by the place in the spring she asked if it was for sale and he told her no; and that she had no discussion with him in regard to price. Plaintiff's attorney then claimed that he was taken by surprise and moved to examine Miss Elsenau under section 60 of the Practice Act, and also to make her a court's witness, rather than an adverse witness under section 60. Defendant objected and the court reserved his ruling on the motion. Miss Elsenau then stated to the court that plaintiff had called and asked her to be a witness and that she told him he had no claim to the commission, "so it comes as no news because he knew I don't feel he had any right to that commission right along. And he did not really show me the property. He told me it was not for sale. I told him that. If he did not tell his attorney it is too bad, because he knew I would be the witness for the defendant and not for Mr. Heilbrunn." Plaintiff's attorney renewed his motion and the court announced:

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Defendant objected and the court sustained the objection.

Miss Eisehart then stated that she was not a party to it.

asked her to be a witness and that she refused to do so.

commission, "as it seems to me, she became involved in it.

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Plaintiff's attorney renewed his motion and the court responded:



motion granted. Plaintiff's attorney continued to examine Miss Elsenau and she was cross-examined by defendant's counsel. In substance she testified: that she met plaintiff through an ad and he showed her various farms including a 40-acre tract on the Lincoln Highway, which she purchased in the early spring of 1954; that plaintiff showed her the place directly west and adjoining the Zuidema farm, and they drove in the yard there, but not into defendant's farm; that as they were driving by the Zuidema farm she said: "What about this farm?" Plaintiff replied: "That is a nice farm but there is a long lease tenant on there and it can't be sold." Several months later she drove into the place west of the Zuidema farm and the tenant there gave her defendant's name and address. When Miss Elsenau first went to see Mrs. Zuidema, she said her farm was not for sale. Miss Elsenau called defendant two or three times and she still was not interested. Finally she became disgusted with her tenant, decided to sell the farm, and asked Miss Elsenau if she wanted it, and she said yes. In her conversations with Mrs. Zuidema there was no reference at all to the plaintiff and plaintiff did not discuss the Zuidema farm with Miss Elsenau.

Mrs. Zuidema, as a witness in her own behalf, restated the matters she had related when examined under section 60, and testified further that when plaintiff admitted that he had his attorney send her a letter, she told him that she had sent the letter to her attorney and that plaintiff could talk to her attorney. She never told Vernon Hattendorf that her farm was for sale and never told plaintiff that he could sell her farm for her. The first time she ever saw or talked to plaintiff was after she sold the farm.

By introducing the testimony of Myrtle Elsenau, plaintiff made her his own witness and was bound by her testimony. *Kirchner v. Kuhlman*, 334 Ill. App. 339, 345; *Cannata v. White Owl Exp., Inc.*, 339 Ill. App. 79, 82; *McCray v. Illinois Central Railroad Company*, 12 Ill. App. 2d 425, 435. Here it appears that plaintiff knew that Miss Elsenau was a witness for the defendant and that she had told him he had no

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...was a witness for the defendant and that she had told him he had no

claim to commission because he had not shown her the property. Miss Elsenau was not subject to call under section 60, and according to her uncontradicted statement to the court, plaintiff was not taken by surprise (United States v. Biener, 52 F. Supp. 54, 56), and there was no basis for calling her as a court's witness. Having called Miss Elsenau as his own witness knowing that her testimony would be adverse, plaintiff was bound by her entire testimony.

Chicago Title & Trust Co. v. Guild, 329 Ill. App. 374, was an action in the nature of an interpleader to determine which of two real estate brokers was entitled to a substantial commission which had been deposited with the circuit clerk to be paid to the successful contestant. In that case it was conceded that a purchaser had been procured, and the question presented there was whether the trial court properly concluded that Guild rather than Hull, was the procuring cause of the sale and entitled to the commission. The purchaser was called as a court's witness apparently without objection by either side, and cross-examined by both parties. The facts in the Guild case are not, as suggested by plaintiff, closely analogous to the facts in the case at bar.

In the instant case plaintiff's testimony regarding his employment as a broker was wholly without corroboration and entirely contradicted by defendant's testimony. Likewise his testimony intended to show that he was instrumental in procuring Miss Elsenau as a purchaser was without corroboration and contradicted by the testimony of the purchaser, as his own witness. While plaintiff was endeavoring to sell properties advertised by him in the Tribune, it would have been natural for him to indicate to a prospective purchaser that other tracts in which the prospect showed an interest, were not for sale. We are inclined to believe that plaintiff probably showed Miss Elsenau the adjoining farm and told her that the Zuidema place was not for sale, and since defendant's testimony is corroborated in many respects by Miss Elsenau, we believe that defendant's testimony that she did not see or talk with plaintiff until the farm was sold, is the more credible.



It is significant that according to his own testimony, plaintiff never advertised the Zuidema place for sale, never brought the parties together, and never attempted to sell the farm to anyone other than Miss Elsenau.

Assuming that plaintiff was employed by defendant and that he showed the farm to Miss Elsenau as indicated by his testimony, nevertheless it does not follow that he was the efficient procuring cause of the sale. A sale finally brought about by the principal with a person with whom the broker had previously negotiated without success, furnishes no basis for commission, if it appears that the broker has for a long time ceased negotiation with the purchaser and abandoned all efforts to induce him to take the property. A time must necessarily arrive when the owner may treat the negotiation at an end and begin an entirely new and independent solicitation. *Mammen v. Snodgrass*, 13 Ill. App. 2d 538, 541; *West End Dry Goods Store v. Maun*, 133 Ill. App. 544, 550. The facts as set forth above bring this case within the principles of law announced in the foregoing cases. Had these principles been correctly applied to the facts as shown by plaintiff's testimony, a judgment for defendant would necessarily have followed.

We conclude that according to plaintiff's own witness he was never employed by the defendant to sell her farm and that plaintiff's inactivity after he took Miss Elsenau by the farm in April and May, 1954, and after she told him she was not interested in buying a farm subject to a long term lease, clearly showed that he had abandoned his effort to induce her to purchase and that he was not the efficient procuring cause of the sale. In our opinion the judgment entered against defendant is palpably erroneous and clearly against the manifest weight of the evidence (*Waghorne v. Hogstrom*, 11 Ill. App. 2d 345). The judgment of the County Court of Will County is reversed and final judgment entered in this court that plaintiff take nothing by his suit and that defendant have and recover her costs from the plaintiff.

Reversed and judgment entered for defendant.

DOVE, P.J., and SPIVEY, J., concur.

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Abstract

Gen. No. 11085

Agenda 7

IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT, SECOND DIVISION  
OCTOBER TERM, A. D. 1957

200 SIGN

ERNEST W. MAUMEN,  
Plaintiff-Appellee,  
  
-vs-  
  
WINORA, INC.,  
Defendant-Appellant.

16 I.A. 196

Appeal from  
Circuit Court of Will County.

FILED

PAUL V. WELLS

CROW, P. J.

The plaintiff, Ernest W. Maumen, appellee, brought this action against the defendant, Winora, Inc., appellant, to recover \$8700.00 alleged to be due him as a real estate broker's commission by reason of the sale of a 635 acre farm belonging to the defendant, that sum being 3% of the sale price of \$290,000.00. The trial was had without a jury. The Court found for the plaintiff and entered a judgment for \$8700.00. The defendant appeals. There was originally an additional defendant, Abe Arcnin, but the Court held that defendant not liable and there is no appeal by the plaintiff from that judgment.

The defendant, in its Second Amended Answer, in substance and so far as material, denied the allegations of the complaint that it had employed plaintiff to procure a sale and promised to pay for services in procuring such a sale a broker's commission

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of 3% of the purchase price, that its alleged letter of March 28, 1955 to the plaintiff confirmed such employment, that the plaintiff had performed all the conditions of his employment, that the plaintiff procured a purchaser, and that the plaintiff was the procuring cause of a sale, but admitted the execution of its letter of March 28, 1955, that the plaintiff made some effort to sell the real estate, that one Everett V. Hogan made an offer through the plaintiff of \$280,000.00, that the plaintiff represented that thereafter Mr. Hogan had made another offer through the plaintiff of \$290,000.00, alleged the plaintiff abandoned his efforts, admitted a sale for \$290,000.00 to purchasers for whom Mr. Hogan acted, on condition of payment by it of a \$1,000.00 broker's commission to another broker who procured the sale, and further alleged that the plaintiff had employed an unlicensed real estate salesman, one Harry T. Tjardes, who had attempted without success to negotiate with the prospective buyer, and that the plaintiff was therefore barred from receiving any commission or suing therefor by the provisions of the Real Estate Brokers' and Salesmen's Act (CH. 114<sup>1</sup> ILL. REV. STATS., 1955, Secs. 1 and 2). On motion by the plaintiff this affirmative defense was stricken. The defendant elected to stand on its pleading. The plaintiff filed a reply to other affirmative matters appearing in other parts of the answer. The case was called for trial January 21, 1957. The defendant moved for a continuance to April, 1957 on the ground that Harry T. Tjardes was a material adverse witness and had unexpectedly absented himself from the State. This motion was denied, although the cause was continued to January 29, 1957.



The defendant, in addition to urging that the Court erred in striking the affirmative defense, and in denying the defendant's motion for continuance, further urges that the Court erred in granting judgment for the plaintiff, and in not granting judgment for the defendant; that the Court should have found that the plaintiff was not the procuring cause of the sale; that the plaintiff's final agreement with the defendant was that the plaintiff would find a buyer at a price which would net \$290,000.00 to the defendant seller, and that the plaintiff could have anything he could get over that figure as his commission, that the plaintiff attempted to sell the farm to the prospective buyer in that manner but did not succeed, and the plaintiff did not so perform; that the plaintiff abandoned negotiations with the prospective buyer, and that the ultimate sale to the prospective buyer was not procured by the plaintiff but through another broker; and therefore that the judgment is contrary to the manifest weight of the evidence, contrary to the law, and should be reversed.

The plaintiff's theory is, in substance, that the action is based on a written agreement of March 28, 1955 of the defendant to pay the plaintiff a commission of 3% of the purchase price in the event the plaintiff produced a buyer, nothing in the evidence changes that agreement, there was no other final agreement or any other agreement different from the written agreement of March 28, 1955, the plaintiff produced the prospective buyer who ultimately actually bought the farm at \$290,000.00, the plaintiff was the procuring cause of the sale, the plaintiff did not abandon his efforts to sell it, and consummation of a sale by a seller on different terms than those proposed to the



broker does not deprive the broker of his compensation, and, further, that the Real Estate Brokers etc. Act does not prevent the plaintiff, a licensed broker, who may have employed a non-licensed real estate salesman, from recovering his broker's commission, and there was no abuse of discretion in denying the defendant's motion for a continuance to April, 1957.

The material evidence is substantially as follows:

The defendant Winora, Inc., owned a farm in Livingston County, consisting of 635 acres, more or less. Abe Aronin was the President and principal shareholder of the defendant. Several real estate brokers were working on the sale of the farm. The plaintiff's first contact with Mr. Aronin was on March 28, 1955, at which time Mr. Aronin told him that he was in debt, and had to sell the farm, and the defendant seller had to realize \$500 an acre for the 635 acres, or a total sales price of about \$317,500.00. Mr. Aronin then had his stenographer write a letter, dated March 28, 1955, which he signed and gave to the plaintiff. The letter stated that Aronin would accept a cash offer of \$500.00 per acre, and would pay plaintiff a broker's commission of 3% of the purchase price in the event he produced a buyer. The letter further stated certain other of the seller's terms of sale, and that this was subject to prior sale or withdrawal of the property from the market. The letter did not give the plaintiff an exclusive right to sell, and the plaintiff understood he was not an exclusive broker.

Following this the plaintiff advertised the farm in various newspapers and on April 3, 1955, one Everett V. Hogan, Decatur, Illinois, wrote the plaintiff stating that he had seen

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one of the ads, and inquired about the farm. The plaintiff thereafter showed the farm to Mr. Hogan. In August, 1955, Mr. Hogan talked with the plaintiff and made an offer to purchase the farm at \$280,000.00 and gave the plaintiff his check for \$500.00. The plaintiff then went to Mr. Aronin's office, told him he had a prospect who had offered to purchase the farm at \$280,000.00, and showed Mr. Aronin the \$500.00 check. Mr. Aronin rejected the offer, and told the plaintiff that he did not want to be bothered with offers for less than his asking price of \$500.00 per acre. The defendant thus first learned through the plaintiff that Mr. Hogan was possibly interested in purchasing the real estate.

The plaintiff left, and later, at Mr. Hogan's request, mailed the \$500.00 check back. Later in August, 1955, the plaintiff had a further conversation with Mr. Hogan and Mr. Hogan then said that he would offer \$290,000.00. The plaintiff then called Mr. Aronin and told him that he had a new offer of \$290,000.00. Mr. Aronin rejected this also. The plaintiff insisted that he was going to lose Mr. Hogan as a prospect, and that the man was going out to Iowa to look at some farm land and might buy it. Mr. Aronin says he then told the plaintiff the seller would have to have \$290,000.00, that the defendant would take \$290,000.00 for the farm and whatever Mammen got over that would be his, but the seller wanted \$290,000.00 net, - that was a specific final deal, the plaintiff could figure and compute any way he wanted to on what the farm would have to be sold for, just so the seller got \$290,000.00, - and in response the plaintiff said: "I'll do the job."

[illegible]



The plaintiff on his direct examination said, in this respect, that: I then went back to Joliet and talked with Mr. Aronin. He said he would have to have \$290,000.00 net to himself, and that I could have anything over \$290,000.00 as my commission. - - - After that I went back home and I went to see Mr. Hogan again in Decatur. I tried to get him to raise his offer to \$298,500.00, etc. The plaintiff also said that at the time of his discussion with Mr. Aronin of Hogan's \$290,000.00 offer he commented that he had to have his commission, he had worked hard, he earned it, and Mr. Aronin said, well, you can have your commission over \$290,000.00, and the plaintiff replied that would not be satisfactory, he'd have to make \$298,500.00 to get the commission, and Aronin answered that's right, we can do that, and Aronin and he finally agreed to put the price at \$298,500.00.

The plaintiff on his cross examination testified as follows in this respect:

"When Mr. Hogan said he would offer \$290,000 I went back to see Mr. Aronin.

Q. Did Mr. Aronin say that he would have to have \$290,000.00?

A. That's right.

Q. Did he say that he would have to have \$290,000.00 net to him?

A. That's right.

Q. And that he didn't care how you got your commission, that you could have any commission you could make over that?

A. That's right.

I said I was going back to Mr. Hogan with an offer of \$298,500.00, and I did. Mr. Hogan would not come up.

I then offered to sell Mr. Hogan the farm at \$295,000.00 and I offered to sacrifice on my commission.

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1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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WILLIAM C. GILFILLAN, JR. (born 1900, 1951)

Q. In other words, you were willing to take that much less in order ---

A. In order to make the sale."

In a book in the nature of a diary for 1955 in which he'd made certain notes concerning this transaction the plaintiff wrote, under August 25 - "Saw Aronin in Joliet will accept \$290,000.00 net to him."

The plaintiff then went to Decatur to see Mr. Hogan again on or about August 25 or 26. The plaintiff told Mr. Hogan that his offer of \$290,000.00 had been refused and the plaintiff himself testified that he told Mr. Hogan that Mr. Aronin was willing to accept any price which would net \$290,000.00 to the seller. The plaintiff told Mr. Hogan that he would have to get something over that in order to make a commission. He discussed with Mr. Hogan what his commission would be, that at 3% on \$290,000.00 he wanted \$8700.00, and then told Mr. Hogan that he'd reduce his commission \$200.00 and Mr. Hogan could have the farm for \$298,500.00. Mr. Hogan rejected this. The plaintiff then said Mr. Hogan could have the farm for \$295,000.00 and that he would sacrifice on his commission in order to make the deal. Mr. Hogan testified that the plaintiff said that in making that \$295,000.00 proposal he was including his commission and had cut it. Mr. Hogan rejected this also. The plaintiff then told Mr. Hogan that he was going away on a vacation and would be gone for some time and that he could be reached through a Mr. Tjardes. That was the last conversation the plaintiff had with Mr. Hogan. Following the plaintiff's conversation of August 25 or 26, with Mr. Hogan, the plaintiff talked with Mr. Aronin and advised him that Mr. Hogan was impossible to

1. The first step is to identify the problem or question that needs to be answered.

deal with, that Hogan would not make any offer above \$290,000.00, it looked like the deal was over, (though the plaintiff says he did not tell Mr. Aronin he was through with the deal), he was not going back to Mr. Hogan, (which the plaintiff denies saying, though the plaintiff testified he did say he was not going back to Mr. Hogan with any higher price than \$290,000), that he was going out west, and that Mr. Aronin could contact him through Mr. Tjardes. That was the last conversation the plaintiff had with Mr. Aronin until the plaintiff returned some months later from the west.

The plaintiff left for the west about September 12th, did not return for about two months, had no communications with either Mr. Aronin or Mr. Hogan while he was gone, and had no further contact with either of them after his return until he saw Mr. Aronin December 12th.

On December 12, 1955, following his return, the plaintiff saw Mr. Aronin, who told him that the farm had been sold to Hogan for \$290,000.00. The plaintiff says he requested an \$8700.00 commission. The plaintiff later learned that Mr. Hogan had bought the farm through another broker for \$290,000.00 and that Mr. Aronin received \$290,000.00, less \$1,000.00, which was the commission to the other broker, Federal Realty, of Dwight, Illinois.

The plaintiff asserts that there was no other agreement between the plaintiff and the defendant than that embodied in the March 28, 1955 letter, and that under this agreement, the plaintiff having admittedly procured the ultimate buyer, who bought at \$290,000.00, he is entitled to 3% of the purchase price, \$8700.00, as his commission. We are unable to agree.



We think the evidence is clear that this March 28th agreement was modified. The conduct of the parties and the testimony of the plaintiff and the defendant are inconsistent with the theory that the plaintiff was operating under an agreement providing simply for a 3% commission on any sale price to the plaintiff's prospect, regardless of what the sale price might be. The plaintiff, it is true, said he told Mr. Aronin several times that if the farm was sold to the plaintiff's prospect at any price he would be entitled to a commission, but there is no evidence that Mr. Aronin agreed to that.

The original agreement expressed in the March 28, 1955 letter of the defendant to the plaintiff was that the defendant would accept a cash offer of \$500.00 per acre, - about \$317,500.00, - and would pay the plaintiff a commission of 3% of the purchase price, - meaning, necessarily, at \$500.00 per acre, - in the event he produced the buyer, - meaning, necessarily, a buyer on those terms, at \$500.00 per acre. That, of course, the plaintiff did not do. Hence, if, as the plaintiff urges, there was no other agreement than that embodied in the March 28th letter, if nothing in the evidence changes that agreement, and if there was no other final agreement or any other agreement different from that, the plaintiff would obviously be barred of any recovery because he did not produce a buyer ready, willing, and able to buy at \$500.00 per acre, - about \$317,500.00. The plaintiff cannot pick one part of the agreement and rely on it and ignore the other part of the same agreement. The plaintiff's theory that there was no other agreement than that, clearly cannot literally be true, and the plaintiff himself cannot literally mean what he says in that respect. That original agreement definitely was modified. It was

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modified as to the seller's sale price. Even the plaintiff, we believe, would have to admit that. We think it was also modified as to the plaintiff's commission, and the modification would not seem unnatural or out of the ordinary. A seller may be perfectly willing to pay a 3% commission on a gross sale of about \$317,500.00, but be unwilling to pay 3% on a gross sale of less than that, such as \$290,000.00. If it were modified as to the seller's sale price, as we think even the plaintiff would have to, and does tacitly, admit, it is well within the area of reasonable probability, under the evidence and circumstances here, to believe it was also modified as to the plaintiff's commission. The real difference of view is not whether that original agreement was modified, but how and to what extent it was modified.

If the agreement between the plaintiff broker and defendant owner were, as the plaintiff urges, a simple agreement that he should have 3% of any purchase price as his commission, and if the defendant owner had no minimum net figure in mind as to what it wanted, the plaintiff thereby choosing to rely on one part of the March 28th letter and ignoring the other part, either in its original or modified form, he would have been entitled to \$8700.00, for which he is suing here, upon a \$290,000.00 sale, at 3%, and Mr. Hogan, the prospective and ultimate buyer, having earlier in August offered \$290,000.00, it would seem the plaintiff would have more naturally and normally have been expected to have closed, or taken every step possible to close, a sale with Mr. Hogan at \$290,000.00 then and there, or simply to have then and there ceased his efforts inasmuch as, under his theory,



he had at that point produced a buyer ready, able, and willing to buy at \$290,000.00, and had thus, under his theory, earned his \$8700.00 commission. There was no apparent reason, under the plaintiff's theory, for the further extended discussion with Mr. Aronin, the admitted conversation about \$290,000.00 net, the comments on commissions, and his talk of a \$298,500.00 price, or for the further extended negotiations of August 25 or 26 by the plaintiff with Mr. Hogan, his trying to get more than \$290,000.00, his telling Mr. Hogan the seller would accept \$290,000.00 net, and his discussing commissions at length with Mr. Hogan. The plaintiff's own version of his conversation with Mr. Aronin at the time he communicated Mr. Hogan's \$290,000.00 offer, and his conversation and acts of August 25 or 26 to and with Mr. Hogan, appear to have been related to, directed to, and tied in with the basic idea or objective of producing \$290,000.00 net for the defendant seller. They are hardly the type of conversations and acts normally to be expected from a broker who has and is operating under merely a simple agreement that he should have 3% of any purchase price, - no matter what price, - as his commission, and particularly not from a broker who has, if that were the case, already previously earned an \$8700.00 commission by having theretofore produced a buyer ready, able, and willing to buy at \$290,000.00, gross.

We can come to but one conclusion, under the evidence and the reasonable inferences, intendments, and implications therefrom, - namely - that the sale was to be completed on a \$290,000.00 net basis to the defendant seller, and this clearly means that no commission would be due or payable unless the plaintiff found a



buyer who would pay the seller in excess of \$290,000.00. To find for the plaintiff we would have to ignore what we believe to be the specific contract between the plaintiff and the defendant.

If the owner of property engages a broker to assist him in making a sale thereof, and stipulates that no commissions shall be paid unless a certain price is procured, such contract is the measure of the rights and obligations of the parties; if the broker does not find a purchaser who will give the price fixed he does not earn his commission; if there be an agreement between the owner and broker that the owner will sell so as to net him \$20,000.00 and the broker may have the excess if he can sell it for more than that figure, and the owner sells at a lesser figure to a purchaser found through the broker, the broker is not, under those circumstances, entitled to a commission on whatever price the property actually brought: REES et al. v. SPRUANCE (1867) 45 Ill. 308. Where the agreement between the owner and broker is that the real estate is to be sold for \$35,000.00 net cash to the owner, the broker to have as compensation all he can sell it for over \$35,000.00, and the broker makes a contract to sell for \$37,500.00, \$1,000.00 down being paid the broker, but the buyer defaults and never pays more than the \$1,000.00, the owner and not the broker is entitled to the \$1,000.00; the broker was not entitled to any compensation until the owner received his \$35,000; if the broker sold it for a sum exceeding \$35,000.00 the excess would belong to him; such a contract differs from the usual agency contract where the compensation of the agent is a per cent of the sale price, in that the compensation is contingent upon the agent's

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obtaining more for the land than the owner has agreed to accept: BURNETT et al. v. POTTS (1908) 236 Ill. 499. When the broker has a prospective purchaser and then the broker and owner agree the owner is to accept \$60 per acre for a sale and the broker is to have as compensation all above \$60 per acre which can be obtained from the prospect, and the land is sold to the prospect for \$60 per acre, the broker is not entitled to a commission of \$2.00 per acre unless the owner and buyer had actually previously contracted a sale at \$62.00 per acre and the owner had permitted the buyer to recede from that contract; the broker is not to be compensated by any agreed commission on the amount of sale, no matter what the amount of the sale, or by the reasonable value of his services, but only by the excess, if any, of any sale price he could obtain, of any, over what the seller was willing to accept: SONGER v. WILSON (1893) 52 Ill. App. 117. And where the agreement between the owner and broker is that the owner will accept \$130 per acre net to him, the broker to have as his compensation whatever he could get above \$130 per acre, and the owner sells the land at less than \$130.00 per acre to a buyer whose attention to it was originally called by the broker, the broker is not entitled to the usual, customary, and reasonable commission; no such agreement was made between the owner and broker; before the broker is entitled to any commission he had to procure a purchaser ready, willing, and able to pay more than \$130.00 per acre, and such would consist of the excess above that figure; having failed to produce such a purchaser the broker is not entitled to any compensation: KAULL v. PASFIELD (1920) 226 Ill. App. 1. Where the agreement between the owner and broker is that

[illegible]



the owner is to have \$25,000.00 net for a farm; the broker to have as compensation any sum realized over that, all the broker is entitled to is any excess, if any, of any sale price over \$25,000.00, if he produces a purchaser who so purchases, and the transaction is completed, or he produces a purchaser ready, able, and willing to buy at a price in excess of \$25,000.00: SAVAGE v. STEWART (1922) 226 Ill. App. 388.

The cases cited by the plaintiff, - HAMMEN v. SNOBCRASS (1957) 13 Ill. App. (2) 538, HAFNER v. HENNON (1897) 165 Ill. 242, HENRY v. STEWART (1900) 185 Ill. 448, DAY V. PORTER et al. (1896) 161 Ill. 235, RABOR v. ISHAM (1924) 310 Ill. 585, DEFUE v. CORDELL et al. (1927) 327 Ill. 254, and BOARDMAN et al. v. BURERT et al. (1927) 325 Ill. 38, - do not militate against our views.

Under the facts as we find them from the evidence, the Court was in error in awarding judgment to the plaintiff. We do not believe that the Court could find from the testimony facts which do not clearly show the original agreement as to a commission was modified, as herein indicated. The plaintiff having failed to produce a buyer at a price exceeding \$290,000.00 or so as to net \$290,000.00 to the defendant seller, he has not performed pursuant thereto and is not entitled to any compensation.

There are other alleged errors argued, but, under the circumstances, we do not find it necessary to pass upon them.

The judgment is contrary to the manifest weight of the evidence, and contrary to the law; there is no competent evidence from which, under the circumstances, the Court could find for the plaintiff; and the judgment is therefore reversed.

REVERSED.

*Wright, J. - Concur*

SOLFISBURG, J. CONCURS

SOLETSBURG, J. CONCURS

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FILED  
FEB 7 - 1958  
JAMES R. GILBERT  
161.A. 369

APPELLATE COURT  
STATE OF ILLINOIS  
FOURTH DISTRICT

October Term, A. D. 1957

Term No. 57-0-5.

Agenda No. 10.

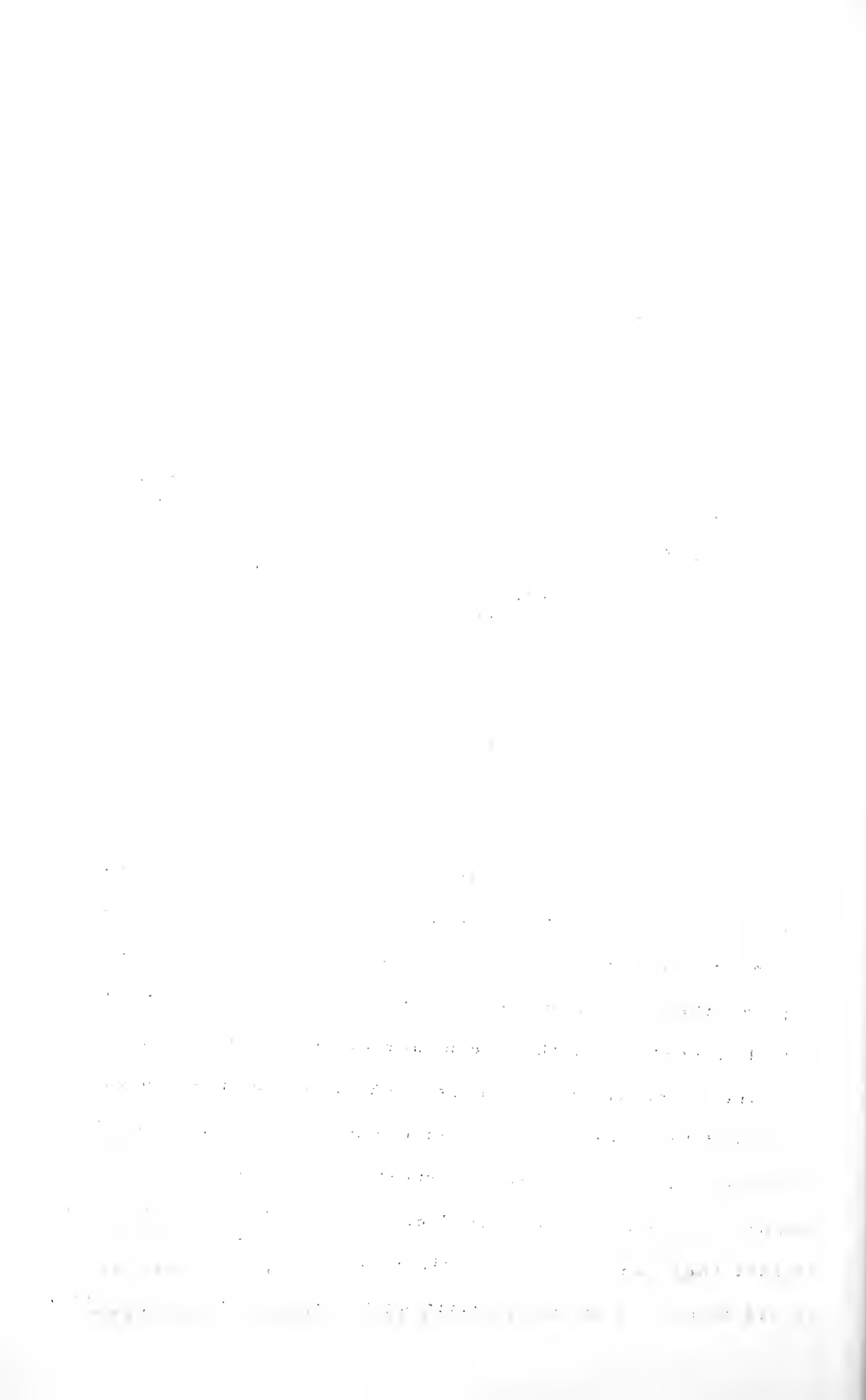
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|--------------------------|---|-------------------|
| JOHN W. STARLING,        | ) |                   |
|                          | ) |                   |
| Plaintiff, Appellant and | ) |                   |
| Cross Appellee,          | ) |                   |
|                          | ) | Appeal and Cross  |
| VS.                      | ) | Appeal from the   |
|                          | ) | Circuit Court of  |
| LIA STARLING,            | ) | St. Clair County, |
|                          | ) | Illinois.         |
| Defendant, Appellee and  | ) |                   |
| Cross Appellant.         | ) |                   |

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BARDENS, J.

This is an appeal from a decree of the Circuit Court of St. Clair County awarding defendant a divorce on her cross-complaint and other relief. Plaintiff's amended complaint charged defendant with adultery and the cross-complaint alleged extreme and repeated cruelty. After a three-day trial without a jury, the trial judge found for defendant and awarded to her custody of the two minor children and child support and attorneys' fees. The basis of the appeal is that the decree is against the mainfest weight of the evidence. We note at the outset that plaintiff's brief does not conform to Rule 7 of the Appellate Court Rules in that there are no specific references to the abstract to aid the Court in determining the evidence relied upon.



Plaintiff and defendant were married in 1950 and have two children, a boy almost six, and a girl four. They lived together until June 13, 1955, when defendant left with the children and began living in a trailer. On July 8, 1955, in a preliminary hearing, custody of the children and support were awarded defendant. Again, in September, 1955, a further hearing before a different judge confirmed the arrangement. On the trial of the issues before a third judge, the Court found the issues for the defendant on her cross-complaint.

It would serve no useful purpose to detail the testimony on the issue of adultery and the counter-claim of cruelty. Suffice it to say, evidence as to defendant's misconduct was wholly circumstantial and turned on testimony of various witnesses as to an alleged paramour's presence at defendant's trailer at various times and under allegedly suspicious circumstances. Any wrongdoing was vigorously denied by defendant and her witnesses.

Both parties recognize that a reviewing Court would not be justified in reversing the decree entered by the chancellor unless the credible testimony clearly preponderates against the decree. *Surratt v. Surratt*, 12 Ill. 2d 21, 145 N.E. 2d 594; *Marcy v. Marcy*, 400 Ill. 152, 79 N.E. 2d 207; *Ayres vs. Ayres*, 142 Ill. 374, 30 N.E. 572. Here the evidence is totally con-

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flicting, and to reverse the decree would require not only that this Court disbelieve defendant's testimony of no misconduct, but that it believe plaintiff's testimony and proceed to draw the inferences therefrom suggested by plaintiff. Thus the issue is the credibility of the witnesses, for the preponderance of evidence is clearly governed thereby in a case where there is substantial testimony on both sides. In no case is the credibility of the witnesses of greater import than in a divorce matter where the human conflict is acute and personal. This quality of the evidence, all agree, is best determined by the chancellor who tried the issues and heard the preliminary petitions. We are therefore unwilling to disturb their considered judgments where we are confronted with wholly conflicting evidence.

On the remaining issues of child custody and attorneys' fees, we again find no clear preponderance of evidence contrary to the result reached by the chancellor. Apart from the inferences suggested by plaintiff's evidence on adultery, all of the specific evidence relating to defendant's fitness to have custody of the children supports the chancellor's finding on this issue. Should further events require an opposite conclusion, this phase of the decree can be altered to protect the welfare of the children in a subsequent proceeding.





Defendant's cross-appeal with respect to the trial court's award to plaintiff of the parties' interest in jointly owned real estate is without merit. The property was bought with a down payment of \$300.00 about three months before the parties separated and the equity is, therefore, negligible. Having allowed defendant to retain \$200.00 which she had withdrawn from a joint bank account, the chancellor had the right, under the statute, to dispose of this interest so as to make the overall adjustment of rights and interests equitable. We find no abuse of discretion in the chancellor's action in this regard.

Decree affirmed.

Culbertson, P. J. and Scheineman, J., concur.

(Publish Abstract Only)

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General No. 10846

(Abstract Only)

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IN THE

16 I.A. 369

APPELLATE COURT OF ILLINOIS

SECOND DIVISION

(First Division)

OCTOBER TERM, A. D. 1957

IRVING DAVIDSON,

Appellee,

vs.

CITY OF ELKHURST, a Municipal  
Corporation,

Appellant.

Appeal from

Circuit Court

DeKalb County

SILVEY--J.

This cause again reaches this court on remandment by the Supreme Court, Irving Davidson v. City of Elkhurst, 145 N. E. 2d 105, reversing a prior judgment by this court, Irving Davidson v. City of Elkhurst, 8 Ill. App. 2d 183, 131 N. E. 2d 112, with directions to affirm the judgment of the trial court if no further error is found.

This court in its prior opinion held that the trial court erred in refusing to direct a verdict for the defendant at the close of all the evidence or in refusing to allow defendant's motion for judgment notwithstanding the verdict and in entering judgment on the verdict for \$9,000.00.

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by the court in the case of *United States v. Smith*, 101 U.S. 164, 168 (1879), where the court held that the defendant's motion for judgment of acquittal was properly denied. This court is of the opinion that the defendant's motion for judgment of acquittal was properly denied in the case at hand. The court entered its judgment of acquittal at the close of the evidence, and the defendant's motion for judgment of acquittal was properly denied. In entering judgment on the verdict for \$10,000.

Pursuant to the Supreme Court's mandate, we have again examined the record in this case and it discloses that because of the result reached this court did not pass upon other alleged errors relied upon by the defendant, namely, that the court erred in refusing defendant's instruction I and in giving plaintiff's instruction II; that the court erred in excluding portions of defendant's evidence, and; that the damages awarded plaintiff are excessive.

Defendant's instruction I is as follows: "The court instructs the jury that a city is not bound under the law, to keep its streets absolutely safe, nor is it bound under the law, to keep them in reasonably safe condition. It is only bound to use reasonable care to keep its streets reasonably safe for ordinary travel thereon by persons using due care and caution for their own safety."

Plaintiff's instruction II reads, "It was the duty of the defendant, City of Elmhurst, to use reasonable care and caution to keep and maintain its public sidewalks in reasonably good and safe repair and condition so as to render said sidewalks reasonably safe for all persons passing on or over such sidewalks on foot and who are exercising ordinary care in so doing."

Defendant calls our attention to the cases of Molway v. City of Chicago, 239 Ill. 486, 88 N. E. 485, and McInley v. City of Chicago, 299 Ill. App. 58, 19 N. E. 2d 452, as authority for his refused instruction I.

In the Molway case the court gave another instruction in addition to one identical with defendant's instruction I.

In the City of Chicago, Ill., on the 1st day of January, 1964,  
 I, John F. Kennedy, Mayor of the City of Chicago, Illinois, do hereby  
 certify that the foregoing is a true and correct copy of the  
 original as the same appears in the files of the City of Chicago, Illinois.  
 City of Chicago, Ill.  
 Mayor

It said in substance that the plaintiff could not recover unless the jury believed that the plaintiff had proven by a preponderance of the evidence that "the street in question, at the time and place of the alleged accident, was not reasonably safe for ordinary travel thereon by persons using due care and caution for their safety." The court went on to say, "These instructions state the law with substantial accuracy."

The McVinley case while holding that a city is not bound under the law to keep its streets absolutely safe also holds that "all portions of a public street from side to side and end to end, are for public use in the appropriate and proper method; but the only duty cast upon the city is that it shall maintain the respective portions of the street in reasonably safe condition for the purposes to which each portion of the street are devoted."

We are not unmindful of the fact that the courts of this state have in some cases stated in effect that cities are not required to keep their streets and sidewalks in reasonably safe condition, however, a careful analysis of these cases leads to but one conclusion, that what was meant was that in all cases there is no absolute duty to keep public ways reasonably safe. The cases on the last at subject are legion with the majority and the better reasoned ones announcing the principles followed in the McVinley case. Defendant lends credence to this pronouncement when in its given instruction III, it is stated in part when referring to the duty of the defendant in relation to its sidewalks that, "If it maintains them in reasonably safe condition it is not liable."

We hold that the trial court properly refused





defendant's instruction I in that it would mislead the jury into believing that a city under no condition is required to maintain its public ways in reasonably safe condition.

Plaintiff's instruction II was approved in Jensen v. City of Streator, 256 Ill. 468, 100 N. E. 286, and when read with other instructions limiting the jury's consideration to the particular sidewalk in question properly states the law.

Defendant next complains of the court's ruling wherein an objection was sustained to a question as to the number of miles of streets in the City of Elmhurst and the introduction of the annual appropriation ordinance of the City of Elmhurst for 1950 and 1951. We find no reversible error in the exclusion of this proffered evidence for it would have little or no probative value. The occurrence took place in the business district of defendant and the evidence attempted to be elicited would have little bearing on the care exercised by the city.

Lastly, defendants contend that the damages awarded plaintiff are excessive. The injuries left plaintiff's leg permanently deformed, stiff and swollen. Plaintiff will be unable to step down on the toes of her left foot. We are unable to say that an award of \$9,000.00 is excessive for these permanent injuries coupled with her pain and suffering.

In view of the foregoing it will be unnecessary to pass upon appellee's motion pursuant to Rule 36 and appellant's objections thereto, both taken with the case.

The judgment of the circuit court of DuPage County is affirmed.

Affirmed.

DOVE, P.J. and McNEAL, J. CONCUR.

DOVE, P. J. and McNEAL, J. CONCUR.

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General No. 11124 (Abstract Only) General 15

IN THE 16 I.A. 320

APPELLATE COURT OF ILLINOIS

SOUTHERN DISTRICT  
(First Division)

COMMENCED TERM, I. D. 1937

JEROME J. TYDA, by Paul Tyda,  
his next friend,

Plaintiff-appellant,

vs.

REITER-SCHMIDT, INC., an Illinois  
Corporation,

Defendant-appellee.

Appeal from the

Circuit Court of

DuPage County.

SPIVEY--J.

Plaintiff, Jerome J. Tyda, a minor, by his next friend sought to recover the consideration paid to the defendant on a contract for the purchase of an automobile. Defendant counterclaimed for damages in recoupment in a like amount. The Circuit Court of DuPage County allowed

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defendant's damages in recoupment in the amount of plaintiff's claim for damages. Plaintiff appeals.

In July, 1956, the plaintiff, then nineteen years of age, entered into a written contract with the defendant to purchase an automobile. At the time of the execution of the contract, the plaintiff represented himself to be twenty-two years of age. He did so in order to obtain the automobile, knowing that the defendant would refuse to sell him the car if defendant were aware that plaintiff was a minor. Upon the execution of the agreement, plaintiff paid as a down payment to the defendant \$175 in cash, conveyed a 1949 Pontiac, and agreed to pay by the terms of the contract of purchase, monthly installments of \$121.20. Subsequently, plaintiff made one installment payment of \$121.20. He testified that at all times until October, 1956, he intended to honor the contract. In October, 1956, the plaintiff was delinquent in his payments, and the defendant repossessed the automobile. The plaintiff then disaffirmed the contract of purchase and demanded the return of his payments under the contract.

On the question of plaintiff's age, the record discloses that plaintiff signed a finance company statement wherein he stated that he was twenty-two years of age. Defendant's agents testified that plaintiff displayed a drivers license indicating his date of birth to be in 1933, which would make plaintiff twenty-two years of age, however, plaintiff denied ever having displayed a drivers license to anyone connected with the defendant.

Plaintiff contends that a minor may rescind or disaffirm a contract either after or during his minority



and recover back any consideration that he has tendered or paid under the contract even though he has fraudulently represented himself to be of full age when entering into the contract. Defendant quite properly concurs in this proposition of law.

The sole question presented on this appeal is whether or not the defendant may recoup his damages by way of set-off upon the facts presented in the instant case.

In the main, plaintiff relies upon the case of Hunter v. Egolf Motor Co., 268 Ill. App. 1 (Second District) and the defendant argues that the case of Deeryman v. Litchner Trailer Co., 307 Ill. App. 480 (First District), 30 N.E. 2d 761 is applicable.

In view of the fact that the common law of England is the law of Illinois in the absence of statutory modification (Ill. Rev. Stat. 1957, Chap. 28, Sec. 1) we believe the Hunter case properly announces the law in Illinois as applied to recoupment for damages by <sup>a</sup> party to a contract which has been disaffirmed by a minor who misrepresented his age at the time of entering into the agreement. We find no significant factual differences in the Hunter case and the instant case. The rules announced in the former would be equally applicable to the latter.

In Hunter v. Egolf Motor Co. a denial of set-off was affirmed. The Court based its opinion on the intention of the minor at the time of purchase. In stating the rule announced in Ashlock v. Vivall, 29 Ill. App. 388, it was said, "The rule \* \* \*, would seem to be that if a minor

the record in the case of the first trial, the jury was instructed that the defendant was not to be convicted unless the evidence showed that he was guilty beyond a reasonable doubt. The jury returned a verdict of guilty, and the defendant was sentenced to the state prison for a term of years.

On appeal, the defendant claimed that the trial judge had erred in his instructions to the jury. He claimed that the judge had told the jury that they were to convict if they believed the evidence was true, and that they were not to consider the defendant's guilt or innocence. The defendant claimed that this instruction was incorrect, and that the judge should have instructed the jury that they were to convict only if they believed the evidence showed that the defendant was guilty beyond a reasonable doubt.

The court of appeals affirmed the trial judge's instructions, and the defendant's conviction was upheld. The court stated that the judge's instruction was correct, and that the jury was properly instructed. The court stated that the defendant's claim that the judge had erred in his instructions was without merit, and that the defendant's conviction was valid.

The defendant then petitioned for a writ of habeas corpus, claiming that the trial judge's instructions were erroneous, and that his conviction was therefore invalid. The court of appeals denied the writ, stating that the defendant's claim was without merit, and that his conviction was valid.

The defendant then petitioned for a writ of habeas corpus in the state supreme court, claiming that the trial judge's instructions were erroneous, and that his conviction was therefore invalid. The state supreme court denied the writ, stating that the defendant's claim was without merit, and that his conviction was valid.

The defendant then petitioned for a writ of habeas corpus in the federal district court, claiming that the trial judge's instructions were erroneous, and that his conviction was therefore invalid. The federal district court denied the writ, stating that the defendant's claim was without merit, and that his conviction was valid.

The defendant then petitioned for a writ of habeas corpus in the federal circuit court, claiming that the trial judge's instructions were erroneous, and that his conviction was therefore invalid. The federal circuit court denied the writ, stating that the defendant's claim was without merit, and that his conviction was valid.

The defendant then petitioned for a writ of habeas corpus in the federal supreme court, claiming that the trial judge's instructions were erroneous, and that his conviction was therefore invalid. The federal supreme court denied the writ, stating that the defendant's claim was without merit, and that his conviction was valid.



falsely represents his age to a person to buy something with the intention of never paying for it, then such act would be a tort and in such case an infant would not be relieved from damage caused the other party by his tort, but if a minor falsely represents his age to another for the purpose of making a purchase with the intention of carrying out his contract, then his failure to carry out the contract is a breach of contract and not a tort and he cannot be held liable for the damage that he caused."

In Whitlock v. Vivell, 29 Ill. App. 388, the court said,

"If an infant vendee obtains possession of goods through the pretense of a purchase, but intending at the time not to pay for them, there is in fact, no contract executed between himself and the vendor. Their minds never met." \* \* \* "Hence, an action to recover damages for such a tort is not an attempt to enforce the contract indirectly by counting on the infant's refusal to perform it, for no contract existed; but a recovery is sought for the damages occasioned by the wrongful and fraudulent act of the infant."

"Such a case is to be distinguished from one where an infant vendee, by virtue of an agreement, made at the time in good faith, to purchase and pay for goods, acquires their possession, and when sued for the purchase price pleads his infancy to defeat recovery. In the latter case he has made a contract, which he may legally avoid if he desires; but in the former he neither made nor intended to make any contract, but obtained the possession of the property by fraud."



In the instant case we find that the act of Jerome Tyda in falsely representing his age at the time of the purchase was not a tortious act on which set-off may be predicated. He testified that at the time of purchase he intended to carry out the terms of the contract which was further evidenced by his payment of one installment. We further find that at the time of purchase there was a meeting of the minds between the plaintiff and the defendant through its agents and that any recovery by defendant in recoupment by way of set-off would necessarily be based upon contract and not upon tort.

Defendant has urged upon us the case of Berryman v. Highway Trailer Co., 307 Ill. App. 480 as being decisive of the case at bar.

In the Berryman case the Court has adopted the theory that in cases of this nature the defendant should be permitted to recoup his damages in a suit at law upon equitable principles. The Court cites with approval and as authority the cases of Davidson v. Young, 38 Ill. 145, and Myers v. Hurley Motor Co., 273 U. S. 18. The Davidson case was an action in equity for a restraining order wherein the Court found as a matter of fact that the infant made no false statements to the purchaser and perpetrated no fraud upon the other party. Not being called upon to pass upon the question, the court merely announced a general principle of law in an equity case assuming infants acts to be tortious. In Myers v. Hurley Motor Co., 273 U. S. 18 (District of Columbia), the Court held that a defendant may recoup his damages in a case that was very similar to the instant case; however, the Court



held "under the facts of the present case," where it was shown that the infant was of mature appearance, that such an action, though brought at law, is in its nature a substitute for a suit in equity, and it is to be determined by the application of equitable principles.

In the Garryan case and Lyons case in which the equitable doctrine the Court made much of the fact that the infant in each case was of mature appearance and was engaged in business using the product purchased. In the instant case there is no like showing as to the appearance of the minor nor as to his business connections.

We hold that the trial court erred in allowing defendant's claim for damages in recoupment on its counterclaim and that the cause is reversed with judgment here for the plaintiff and against the defendant in the amount of \$350.

Reversed.

Dove, P. J. and McNeal, J., concur

Dove, F. J. and McNeal, J., 1969.

47226

AMELIA HAIKEY,

Appellant-Cross-Appellee,

v.

JOHN B. HAIKEY,

Appellee-Cross-Appellant.

16 I.A.<sup>24</sup> 371

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Amelia Haikey and John B. Haikey were married in Chicago on November 12, 1938. No children were born of the marriage. The parties, except for the time during World War II when the husband was in the armed forces, lived together until October, 1955. At that time he was absent for a week. A permanent separation began on January 16, 1956. On April 11, 1956, the wife filed her complaint for separate maintenance, alleging that on January 16, 1956, the defendant wilfully deserted and absented himself from her without any just or reasonable cause, since which time she has been living separate and apart from him without fault on her part. He denied the allegations of desertion. In a counter-complaint he asked for a decree dissolving the bonds of matrimony on the ground that on January 16, 1956, plaintiff wilfully deserted and absented herself from him, which desertion continued up to the time of filing the cross-complaint. Plaintiff denied these allegations. A trial resulted in a decree finding that the plaintiff failed to sustain the allegations of her complaint; that the defendant sustained the allegations of his counter-complaint; that the bonds of matrimony he dissolved; that a bank account in the La Salle National Bank of Chicago in the joint names of the parties be equally divided between them; that the





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parties each respectively pay their attorney's fees and costs; and that the defendant pay to the plaintiff the sum of \$17.50 per week as permanent alimony commencing with the entry of the decree. Plaintiff, appealing, asks that the decree for divorce be reversed and that the cause be remanded with directions to enter a decree for separate maintenance for the plaintiff with an appropriate provision for her support. Defendant asks that the parts of the decree granting him a divorce and denying her separate maintenance be affirmed and that the part of the decree awarding alimony to plaintiff be reversed. The parties do not voice objection to the provision of the decree dividing the bank accounts.

The parties resided at 436 Harrison Street, Oak Park, Illinois, for 10 years and plaintiff presently resides there. She is unemployed. She had part time employment while her husband was in service. She is dependent upon him for support and maintenance. For the past 11 years he has been employed by the Overland Greyhound Bus Company as a bus driver. His bus run is from Chicago into Iowa. He would generally leave Chicago at midnight and return two days later. As a bus driver he earned approximately \$90 a week, plus overtime. He derived additional income from the rental of a 40 acre farm in Oklahoma in which he has a one-third interest, disability pension from the Veterans Bureau and small amounts from the occasional sale of job insurance and from making and selling leathercraft.

Since the defendant took employment as a bus driver disagreements between them became common. Plaintiff testified that she received numerous telephone calls from women callers inquiring for defendant, and that frequently she found lipstick



other than her own on defendant's shirts. He accused ~~xx~~ her<sup>of</sup> being unjustly suspicious of his conduct. Arguments followed. The defendant makes no charge of infidelity, cruelty or misconduct. He states that plaintiff was suspicious, possessed a temper and was miserly with his money. All of these charges the plaintiff denied. She has been ill off and on during their married life and is presently under the care of a physician. She has an arrested case of tuberculosis and is treated intermittently for this condition. In 1952 she was hospitalized as a result of a severe infection of her female organs. In December, 1956, she had a breast biopsy.

During the marriage the parties accumulated certain assets. From the sale of a summer home there remains the sum of approximately \$2,500 which is on deposit in a joint account in the LaSalle National Bank of Chicago. The plaintiff has possession of and is using the furniture of the parties acquired during the marriage. The defendant at the time he left took with him \$1,050 in United States Savings Bonds. The plaintiff has in her possession approximately \$600 or \$700, which is the balance remaining of \$1,700 in a joint bank account. The ~~amount~~ expended from the account was used by the plaintiff to maintain and support herself, including rent and medical care for a period of approximately 2-1/2 months following the separation, during which time the defendant failed to contribute any money to her.

The reasonable cause that justifies the departing spouse in leaving must be such that it would of itself entitle the party



abandoning the home to a divorce. See Coolidge v. Coolidge, 4 Ill. App. 2d 205; Swan v. Swan, 331 Ill. App. 295; Godfrey v. Godfrey, 284 Ill. App. 297; Webber v. Webber, 349 Ill. App. 154. The evidence shows a long and continuous course of conduct on the part of the defendant calculated to arouse the suspicions of a reasonable woman. The defendant admits the substance on his shirts was lipstick. All that can be said against the plaintiff is that her alleged remonstrances and complaints made his life unpleasant. The plaintiff treated the defendant as a good wife should. She was a good housekeeper. He relied upon her to manage his funds, and their savings show that she was successful in doing this. The decree was entered on the basis that the evidence established constructive desertion. This is not a case where the wife was leveling unfounded charges against her husband. The evidence shows that women were calling on the telephone and that he had lipstick on his shirts. The defendant admitted that he knew one of the women, Lee Thomas. As a result of the altercation on January 16, 1956, the defendant left the family home. We hold that the evidence falls far short of sustaining a decree for divorce.

The evidence establishes that plaintiff is living separate and apart from the defendant without fault on her part. Therefore she is entitled to separate maintenance. The decree is reversed and the cause is remanded with directions to dismiss the cross-complaint for want of equity and to enter a decree for appropriate separate maintenance and for attorney's fees.

DECREE REVERSED AND CAUSE  
REMANDED WITH DIRECTIONS.

FRIEND and BRYANT, JJ., CONCUR.

ABSTRACT ONLY.



47230

FOREMOST INSURANCE AGENCY,

Appellee,

v.

SIDNEY PANCOE,

Appellant.

16 I.A.<sup>2d</sup> 371

APPEAL FROM MUNICIPAL  
COURT OF CHICAGO.

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Defendant appeals from an adverse judgment in the amount of \$1000.00 and costs entered in the Municipal Court pursuant to a trial without a jury.

The essential facts disclose that plaintiff is an insurance agency, and defendant an insurance broker. In February 1955 defendant introduced his brother-in-law, Herman Kamen, president of Consolidated Excavating and Trucking Company (hereinafter referred to as Consolidated) to plaintiff insurance company for the purpose of obtaining insurance coverage on various operations of Consolidated, beginning March 1, 1955 and ending February 29, 1956. Defendant was to receive commissions as broker on these policies. Numerous policies were issued by plaintiff to Consolidated as the insured, all having a policy period extending over the foregoing dates. After the policies went into effect numerous billings took place directly from plaintiff to Consolidated. During the course of the year Consolidated paid \$4179.74 in premiums by checks payable to plaintiff. The original premiums on these policies were paid in full by Consolidated. Likewise during this period additional or audit premiums also became due periodically on these policies to cover additional vehicles and other increases in risk that





occurred. These audit premiums were assessed against Consolidated on the basis of audits made three, six and seven months after the inception date of the original policies. On expiration of these contracts of insurance on February 29, 1956 some of the audit premiums were unpaid by Consolidated.

The foregoing facts are substantially undisputed. The controversy arises over an alleged oral contract between the insurance company and defendant wherein the latter was alleged to have made himself personally responsible for the unpaid insurance premiums on policies issued to Consolidated. Plaintiff introduced some evidence that it paid the audit premiums to the underwriting companies when the audits were made. After the audit premiums were billed and remained unpaid, plaintiff became concerned and contacted Pancoe, the defendant, who had brought the parties together. In its amended statement of claim plaintiff seeks recovery on an oral guaranty alleged to have been made by Pancoe to pay the audit premiums if Consolidated failed to do so; the consideration for the alleged guaranty was plaintiff's forbearance in not canceling the various policies before their expiration date. Plaintiff contends that if the policies had been canceled before their normal expiration date, the refunded unearned premiums on the original contracts of insurance would have more than reimbursed plaintiff for the amounts of earned audit premiums it said it had paid to the underwriting companies when the premiums became due. Defendant denied that he guaranteed the payment of the premiums in any



way, or in any manner made himself responsible for them.

Plaintiff's evidence on the guaranty consists solely of S. L. Rosenfeld's testimony of his recollection of two telephone conversations had with Pancoe. Rosenfeld was president of plaintiff insurance company. He testified that he called Pancoe in September or October of 1955 in regard to the audit premiums, and that at that time defendant said "we should go along and he would guarantee the payment of them"; that he called Pancoe again in January 1956, and in the course of that conversation defendant again guaranteed the payment of the audit premiums. Pancoe denied positively that he had promised to pay the premiums himself or that he had guaranteed their payment. The pertinent portion of Rosenfeld's testimony as to the September 1955 conversation is as follows: "I asked him when he was going to pay these earned audit premiums for his brother-in-law. He told me that we should go along a little longer and that his brother-in-law was good for it and that he would pay for it. ... I told him we would have to cancel these policies if the audit premiums were not paid because we had to pay them to our company. He said we should go along and he would guarantee the payment of them." Rosenfeld's testimony as to the conversation in January 1956 is as follows: "I told him that the policies were going to expire March the 1st of '56 and that we had a chance of canceling that policy, and we would not lose any money on the audit premium which we had paid out. His reply was that his brother-in-law was having a rough time and he would guarantee the payment of these premiums and there was nothing to worry about." Obviously



Rosenfeld did not consider the defendant personally bound as the result of the September conversation since he again called in January and threatened to cancel the policies. Moreover, it appears that after the supposed January guaranty plaintiff, on February 10, 1956, in a letter to Consolidated, again referred to cancellation of the policies, and it is significant that plaintiff continued to direct original invoices for these audit premiums to Consolidated as late as November 25, 1955. It is difficult to reconcile defendant's alleged promise to guarantee payment of the audit premiums in January 1956 with the fact that plaintiff addressed letters to Consolidated in February and March of that year requesting payment from Consolidated and mentioning that credit had been extended to Consolidated. The letters were demands on Consolidated; at no time before filing suit was any demand made on defendant. These circumstances are important when taken in connection with Pancoe's testimony in relating the telephone conversations had with Rosenfeld, as follows: "I know he is good, I know he needn't worry about it, that he was a little tight for money but that he would pay him." Plaintiff seeks to interpret this testimony, which amounts to no more than words of encouragement, as a guaranty, and to convert it into a binding contract where none apparently was intended.

In order to prevail, it was incumbent upon plaintiff to prove clearly that Pancoe had made the oral promise to become personally responsible for the debt of another, namely Consolidated, and that plaintiff acted in reliance



on the guaranty. The only two witnesses upon the hearing were Rosenfeld and Pancoe. In support of Pancoe's positive denial that he promised to pay the premiums himself, the records show that the plaintiff insurance company did not rely on the guaranty, that it wrote letters to Consolidated after the audit premiums became due and billed Consolidated with invoices for the unpaid premiums. On this state of the record the court was not justified in finding that the guaranty was made or that plaintiff relied on an alleged guaranty on the part of defendant.

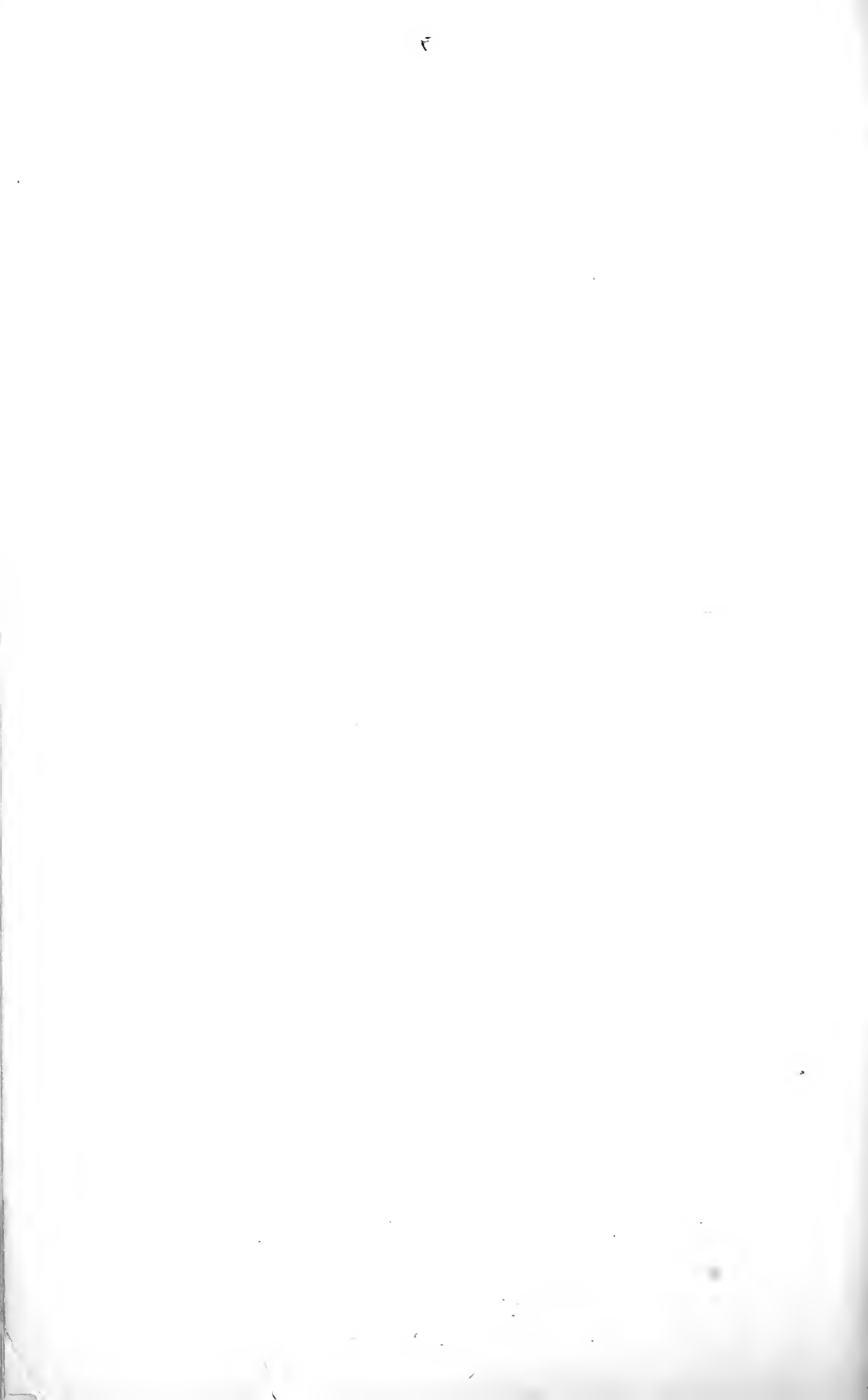
A considerable part of the respective briefs is devoted to the question whether the alleged oral agreement was barred by operation of the Statute of Frauds as the promise to answer for the debt of another (Ill. Rev. Stat. 1957, ch. 59, sec. 1). It appears to be <sup>the</sup> settled rule in this State that a promise is held collateral and within the Statute of Frauds where the plaintiff continues to treat the third party's obligation as primary by accepting payments from the third party after the defendant's promise was made, or otherwise acting toward the third party in a manner consistent with his remaining as the principal debtor; and where the obligation of the third party is in existence at the time of defendant's promise, and the relations between the creditor and the third party remain unchanged both as to the right and the remedy of the creditor against the third party, the promise is held to be collateral and within the Statute of Frauds. In *Duboc Paper Co. v. Flint*, 207 Ill. App. 367, the rule is stated to be that an oral promise for the payment for merchandise is a collateral and not an original promise where credit is given on the





seller's books, and bills for the goods are regularly rendered after delivery to the debtor, and it is immaterial that a duplicate statement of the account sent to the debtor was mailed to the guarantor with words in writing, placed thereon by the seller, that it was guaranteed by the guarantor. To the same effect are *Home Nat. Bank v. Waterman*, 134 Ill. 461, *Ruggles v. Gatton*, 50 Ill. 412, *Trento v. DeBenedetti*, 283 Ill. App. 182, and *Combs v. Pulliam*, 190 Ill. App. 350.

The Statute of Frauds was evidently designed to require a more demanding, a more nearly certain, type of evidence to charge a party where that party does not receive the substantial benefit of a transaction in which another is primarily liable to pay the debt. The statute thus affords a greater security against the setting up of fraudulent demands; its purpose was not to effectuate, but to prevent, wrong. Therefore, in cases where defendants have sought refuge behind the statute against apparently meritorious claims, the courts have found room for an exception to the statute, but the frauds that the courts have attempted to prevent by varying from a strict interpretation of the statute seem not merely to consist of breaking a promise supported by adequate consideration, but rather the refusal to pay when the promisor's promise has induced the promisee to confer valuable benefits upon the promisor himself. Here the testimony is conflicting as to whether defendant received commissions. He testified that he "was to receive commissions on these policies" but that he "never did"; plaintiff's president, on the other hand, stated that the agency "credited Mr. Pancoe's account \$103.58, and \$131.03."



This is the testimony that would have to be evaluated in determining whether or not there was material benefit accruing to defendant, but in the light of our finding that there was no promise on defendant's part to assume the premium payments in the event of their not being paid by the insured, this evidence does not have a bearing on the determination of this case. "It was held in the early case of Hite v. Wells, 17 Ill. 88, that the statute of frauds cannot be avoided by the mere show or form of an independent agreement. 'It is the substance and force of the contract to which the courts will look in determining whether the contract is an original one, or incidental and collateral to the debt or liability of another.'" Trento v. DeBenedetti. The circumstances of this case remove it from those situations where the courts have felt compelled to exempt the particular proceeding from the operation of the Statute of Frauds.

For the reasons indicated, the judgment of the Municipal Court is reversed, and the cause is remanded with the direction to enter judgment, including costs, for defendant.

JUDGMENT REVERSED AND CAUSE  
REMANDED WITH DIRECTION..

BURKE, P. J., and BRYANT, J., CONCUR.

ABSTRACT ONLY.



STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

February Term, A. D. 1958

161A.372<sup>24</sup>

General No. 10132

Agenda No. 2

Dorothea Sager,

Plaintiff-Appellant,

vs.

Appeal from the  
Circuit Court of  
Sangamon County

Paul Steele et al.,

Defendants.

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"

"

Henry C. Husmann and William Thompson,

Defendants-Appellees.

CARROLL, P. J.

In this action, plaintiff seeks to recover a real estate broker's commission from defendants. The issues were tried by a jury which returned a verdict in favor of defendants. After denying plaintiff's post trial motions, the court entered judgment on the verdict, and plaintiff has appealed.

In contending for reversal of the judgment, plaintiff relies upon 16 errors which are specified in her brief. Separate consideration of these numerous assigned errors will not be undertaken since it is apparent from examination thereof that the same amount only to a contention that the verdict is contrary to the manifest weight of the evidence and that the trial court erred in

10/2/54

the giving and refusing of certain instructions.

The property involved is a house built by defendant Thompson on a lot in Fox Meadows Addition to Springfield. The defendant Husmann is a general contractor and a salesman for Paule Steele, a real estate broker, and appears to have had some interest in the Thompson house. According to plaintiff's testimony, in August, 1954, she saw an ad for the sale of the Thompson house in a Springfield newspaper; that she then contacted Thompson and asked his permission to sell the house; that Thompson said "sure anybody that brings me a buyer I will pay them a commission"; that she asked what the price was and Thompson replied that he wanted to get \$25,000; that she then said she would price the house at \$28,500; that Thompson told her that the commission could be paid out of the amount above \$25,000. The record does not appear to disclose any other conversations between the parties directly pertaining to the employment of plaintiff. However, plaintiff testified to a number of other conversations with Thompson which would tend to show that the latter with knowledge of plaintiff's efforts to sell the house, permitted her to contact such parties. There is apparently no dispute as to the fact that plaintiff showed the house to Arch and Rose Maulding to whom it was subsequently sold by the defendants for \$27,250. Plaintiff testified that she did not see Husmann until after the house had been sold to the Mauldings; that at that time she told Husmann she expected a commission on the sale.

[illegible]



Defendant Thompson testified that the property was listed for sale exclusively with Husmann; that he never discussed the selling price with plaintiff; that he did not promise to pay her a commission; and that upon numerous occasions he told her that if she wanted to sell the house she must work through Husmann. When asked whether he recalled the conversations with plaintiff, to which the latter testified, the witness said "lots of times, every day she would call up, tormentin', wantin' to sell the house. I would say no, absolutely not".

Bernice Thompson, wife of defendant Thompson, testified that she gave plaintiff the keys to the house; that her husband did not tell her to do so; that she told plaintiff that Mr. Husmann had the house for sale; and that plaintiff said she would contact Husmann.

[ ) The basis of a broker's right to recover a commission for services is proof that in rendering such services he acted as the agent of such owner. A contract of employment is necessary to establish the relationship of agency between the broker and the owner of property. While no particular form of words are required to create such a contract, it is necessary that the broker act with the consent of the owner and such consent may be given in writing, orally or be implied from the conduct of the parties. Doss v. Kirk, 3 Ill. App. 2d, 536; Greenwald v. Marcus, 3 Ill App. 2d 495; Purgett v. Weinrank, 219 App. 28. However, a mere statement to a broker of the price at which the owner will sell is not in itself sufficient to imply a contract of employment. Bunn v. Smith, 190 Ill. App. 530 (Abstract).

testamentary disposition, that the property is to be

for sale and delivery of the same; that the property is to be  
selling and delivery of the same; that the property is to be  
conveyance; that the property is to be conveyed to the  
wishes to sell the same; that the property is to be  
whether he is selling the same; that the property is to be  
latter estate; that the property is to be conveyed to the  
would sell the same; that the property is to be conveyed to the  
no, absolutely not.

that she, the plaintiff, is the owner of the property;  
not all the property; that the property is to be conveyed to the  
the house for sale; that the property is to be conveyed to the  
the house for sale; that the property is to be conveyed to the  
services in the house for sale; that the property is to be conveyed to the  
except of such services; that the property is to be conveyed to the  
established for the purpose of the property; that the property is to be conveyed to the  
of property; that the property is to be conveyed to the  
such a contract; that the property is to be conveyed to the  
sent of the owner of the property; that the property is to be conveyed to the  
be applied to the property; that the property is to be conveyed to the  
25, 26; Greenwell v. Greenwell, 211 N. 211; 211 N. 211;  
219 App. 21. However, it is not necessary to decide  
which the owner will sell to the plaintiff; that the property is to be conveyed to the  
contract of conveyance. Green v. Green, 211 N. 211; 211 N. 211; 211 N. 211.

Obviously, the evidence in the record created an issue of fact on the question as to whether the plaintiff was employed by defendants as a broker. The testimony of plaintiff and of defendant Thompson as to their conversations concerning the sale of the house is in direct conflict. The same may be said also of the testimony relative to the conduct of the parties. The testimony of Thompson and his wife relating to the giving of the keys to plaintiff is that plaintiff was given the keys with directions to work through Husmann. It has been repeatedly held that where the evidence is in conflict it is not the province of the court to substitute its judgment for that of the jury. Griggas v. Clauson, 6 Ill. App. 2d, 412; Koch v. Lemmerman, 12 Ill. App.2d, 237. The jury are the judges of the credibility of the witnesses and to the weight to be given their testimony and only where the verdict is palpably erroneous will it be disturbed by the reviewing court. Rembke v. Bieser, 289/11. App. 136; Hudson v. Leverenz, 9 Ill. App. 2d, 96. A jury's verdict cannot be held to be against the manifest weight of the evidence unless an opposite conclusion be clearly evident. Dinger v. Rudow, 13 Ill. App.2d, 444; DeLong v. Whitehead, 11 Ill. App. 2d, 330; Griggas v. Clauson, *supra*. On the record before this court, we cannot hold the verdict to be against the manifest weight of the evidence.

Plaintiff contends the trial court erred in the giving and refusing of certain instructions. Only the particular instructions concerning which complaint is made are included in the abstract and the latter does not show that the same comprise all of the given instructions. In numerous cases it has been held that error cannot

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DEPARTMENT OF THE HISTORY OF ARTS

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be predicated upon the instructions unless all the instructions are made a part of the abstract. People v. Woodruff, 9 Ill. 2d, 429. For the above reason, the ruling of the trial court with respect to the instructions is not before us on this review.

Plaintiff also complains of the ruling of the trial court on the admission of certain evidence offered by her on the trial. We are satisfied, however, that the record does not support such complaint and that plaintiff's rights were not prejudiced as the result of the court's action in this respect. The determinative issue in this case, was whether defendants engaged the plaintiff to act as their agent for the sale of the property in question. All facts material to such issue appear to have been submitted to the jury. The fact that its verdict was adverse to plaintiff's theory affords no basis for a conclusion that she was deprived of a fair trial.

Upon consideration of the whole record, we are of the opinion that it discloses no reversible error and that the verdict finds ample support in the evidence. The judgment of the Circuit Court of Sangamon County is affirmed.

Affirmed.

REYNOLDS and ROETH, JJ., concur.

For the above reason, the utility of the trial court in making the above finding is not affected by the fact that the defendant was not a party to the trial.

1. The Court of Sessions at Edinburgh, in the case of *James v. James*, 1891, 15 F. 100, held that a husband is liable for the maintenance of his wife and children, and that a wife is liable for the maintenance of her husband and children.

TEYMONITS, MR. ARTHUR E. BILLYEY

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February Term, A.D. 1958

General No. 10137

A. enla No. 7

Paul P. Conaghan.

Plaintiff-Appellee,

v3.

James I. Bates.

Defendant-Appellant.

A peal from the  
Circuit Court of  
Champaign County

Boeth, J.

plaintiff obtained judgment by confession in the Circuit Court of Champaign County on the 19th day of December, 1956, and execution was served on defendant on the 26th of December, 1956. On January 16, 1956, defendant filed his motion to vacate the judgment with accompanying affidavits. No argument is presented in this court that said motion was not timely made. The Circuit Court denied defendant's motion to vacate and this appeal was taken by the defendant.

Plaintiff is trustee over certain land situated near Easton, Illinois, which plaintiff caused to have subdivided. Defendant is a building contractor and the president of an Illinois corporation called Ideal Homes, Inc. The judgment was obtained on three notes which were payable to the plaintiff and signed by the

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defendant. They are general notes containing a warrant of attorney to confess judgment. The first is dated April 26, 1956, and payable in three months. The second is dated May 22, 1956, payable in sixty days and the third is dated June 14, 1956, and payable July 26, 1956. Beneath the printed matter on each of the notes certain information has been typed and for purposes of clarity all that appears below that printed matter is set forth below.

"Note 1. Lots No.'s 30, 31,  
32, 33, 34, 35 (For Due July 26, 1956.  
the acct. of Ideal Homes,  
Inc.)

/s/ James P. Estes

"Note 2. Lot No.'s 14, 16, 18  
For the acct. of Ideal Due July 22, 1956.  
Homes, Inc.

/s/ James P. Estes

"Note 3. No. 44 Due July 26, 1956.

/s/ James P. Estes "

From the record it appears that the plaintiff, defendant and Ideal Homes, Inc., hereafter called the corporation, entered into some agreement with reference to the real estate owned by plaintiff as trustee under the above-mentioned trust. The extent of the agreement is disputed by the affidavits and counter-affidavits filed. The record discloses, however, that plaintiff conveyed certain lots in the subdivision and in return had received some funds in payment for said lots. On April 26, 1956, plaintiff conveyed lots 30 to 35, naming the corporation as grantee and



defendant signed the first of the said notes and it was delivered by an attorney acting in his behalf. On or about the 22nd of May, 1956, plaintiff conveyed lots 14, 16 and 18, naming the corporation as grantee and defendant signed note number two and the same was delivered by defendant's attorney to the plaintiff. That on or about June 14, 1956, plaintiff conveyed lot 44, naming the corporation as grantee and the defendant signed the third note and delivered said note by his attorney to the plaintiff. Defendant does not deny the execution of said notes nor that plaintiff conveyed the land to the corporation.

Defendant filed his affidavit along with an answer and subsequently filed an additional affidavit. Plaintiff filed his motion to strike defendant's motion and counter-affidavits and supplemental counter-affidavits and attached thereto various correspondence between the parties.

Plaintiff contends that this court does not have jurisdiction to review the order of the Circuit Court denying defendant's motion to open the judgment but that contention is without merit. Pickard v. Rice, 329 Ill. App. 185, 67 N.W. 2d 425, 2 Ill. Law & Practice, Sec. 132, Page 212-13. An order denying a motion to vacate a judgment is an appealable order.

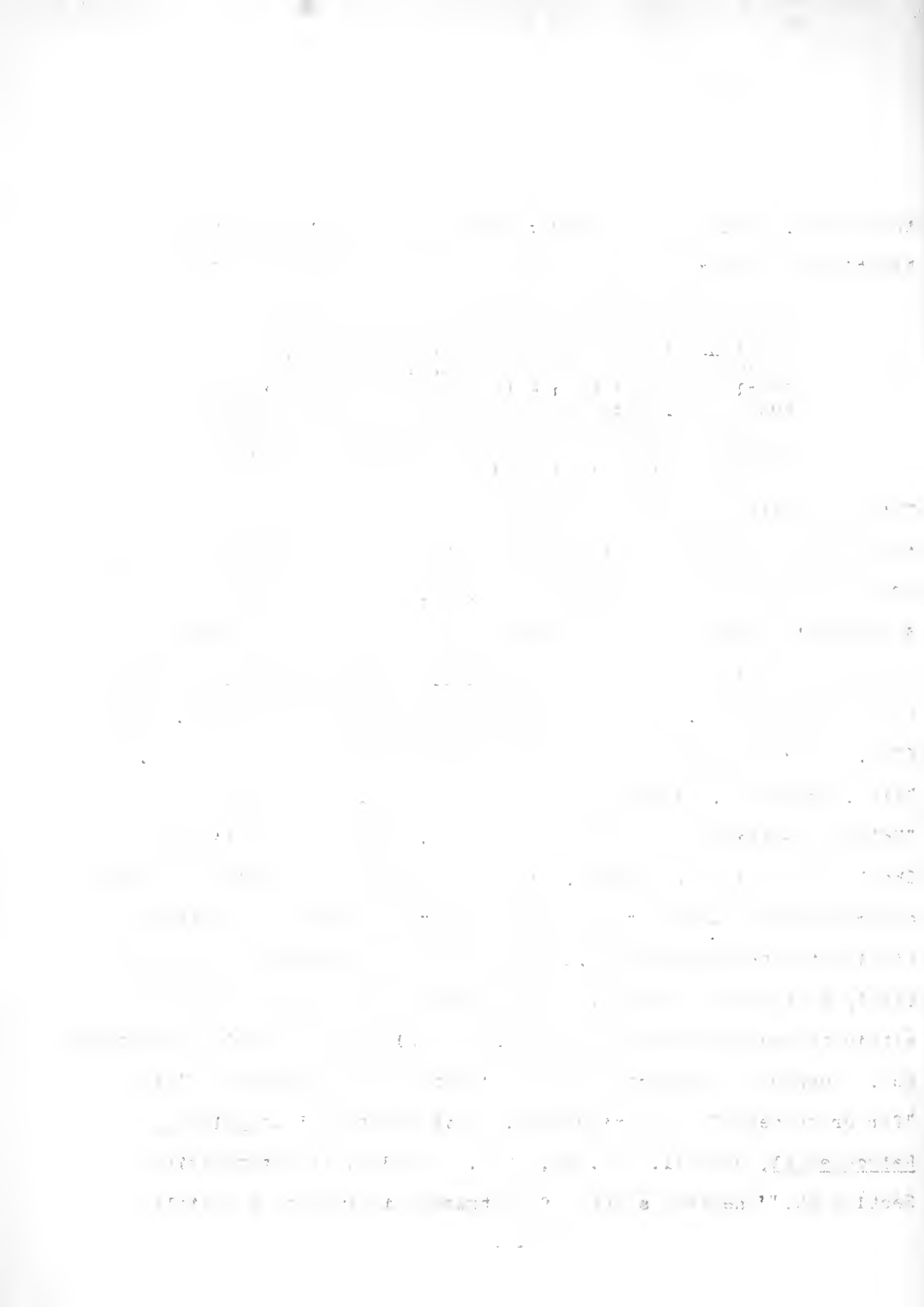
Defendant contends the lower court erred in denying his motion to vacate and sets out several grounds for reversal of that order. He contends first that he signed the note in a representative capacity for the corporation, and not individually, and maintains

[illegible]

that the transaction comes under Chapter 98, Section 20 of the Negotiable Instrument Act. (Illinois Revised Statutes 1955).

"Where the instrument contains, or a person adds to his signature, words indicating that he signs for or on behalf of the principal, or in a representative capacity, he is not liable on the instrument if he was duly authorized; but the mere addition of words describing him as agent or as filling a representative character without disclosing his principal, does not exempt him from personal liability."

This contention certainly cannot be made with reference to the third note as nothing is contained in that note except the signature of the defendant and the notation No. 44. We do not believe defendant's contention to be correct with reference to notes one and two. He cites the case of Shircliff v. Dixie Drive-in, 7 Ill. App. 2d 370, 129 N.E. 2d 346, Buwisch v. Theis, 325 Ill. App. 307, 60 N. E. 2d 108. In the former case the note was signed "Ray C. Keith, president, Dixie Drive-in Theater, Inc.". In the latter "Holsinger-Theis and Company, Inc., J. W. Holsinger, president, Charles H. Theis, treasurer". In each instance the additional words are meaningless unless they are interpreted to mean the signer is signing for the corporation. In the case at bar two of the notes merely state "for the acct. of Ideal Hores, Inc." and do not come within the meaning of section 20 of the Uniform Negotiable Instruments Act. Nothing on the note tends to indicate that defendant signed "for or on behalf of a principal". This court held in Smith v. Reisch et al, 329 Ill. App. 45, 67 N.E. 2d 304, in interpreting Section 20, "Whenever a form of instrument is such as to fairly



indicate to the eye of common sense that the maker signs as agent or in a representative capacity, he is relieved of personal liability if duly authorized.' Zavadii v. Norris, 287 Ill. App. 627, 5 N.E. 2d 621." The phrase "for the acct. of Ideal Homes, Inc." does not indicate, in our opinion, the signing was in a representative capacity. Furthermore the defendant in his additional affidavit states and acknowledges that the notes were executed by him in his individual capacity on demand of the plaintiff. For these reasons it cannot be said that parol evidence is admissible to show the notes were signed other than by defendant individually, whatever else may be said about the merits of defendant's claim.

Defendant also contends he received no consideration for the signing of the notes. In his first affidavit he states plaintiff and the corporation had entered into an agreement to build houses on certain lots and that he is an officer of the corporation; that he as a building contractor was hired by the corporation to build the houses and that he did so construct numerous houses on various lots; that for these services he was paid by the corporation and that he at no time received any money or other consideration from the plaintiff, nor did he personally have any agreement with the plaintiff; that he made certain profits from his work with the corporation and he has expended large sums of money in preparing to construct homes for the corporation in the subdivision. He then alleges that the plaintiff breached his agreement with the corporation and he as a result has suffered a great pecuniary loss. In his second





affidavit defendant sets out the purported agreement between plaintiff and the corporation and the alleged breach by the plaintiff. In paragraph 7 he states in substance, that at the time of the making of the joint venture agreement plaintiff did demand that there be executed and delivered over to him individually the promissory notes which constitute the subject matter of this litigation and demanding that said notes be executed by defendant in his individual capacity assuring defendant and the corporation that plaintiff would look solely to the corporation for the payment of such obligation in the event that such obligation should become due and payable; that no consideration did flow from plaintiff to defendant or to the said corporation but the said notes were delivered solely for the purpose of aiding plaintiff in his design to insure that the proceeds of such joint venture agreement would not for the purpose of the U. S. income tax be treated as ordinary income but would be treated as a capital gain and for the purpose of a memorandum of the amounts allocable to the said plaintiff at such time as a closing of the sale of the parcel so developed, and only then was the amount so allocated to be paid over to the said plaintiff and then by the corporation and not by the defendant.

The sum and substance of defendant's affidavits is that all dealings with reference to the buying and selling of lots in the subdivision were between plaintiff and the corporation; the notes were signed by defendant individually at the insistence of the plaintiff with the understanding that he would not be liable on them but that they would be paid when due by the corporation;



he personally received no consideration for signing the notes; and despite the recitation on the notes, namely that they were due within certain set periods of time, they were not due and payable until the lots were sold by the corporation and this by virtue of the joint venture agreement between plaintiff and the corporation.

It is clear from the record that the notes were given to plaintiff in exchange for deeds to various lots naming the corporation as grantee and the question now is, whether under the circumstances set out, the defendant can be held to account for them.

Defendant contends that a collateral agreement that a person executing a negotiable instrument is not to be obligated to make payments is binding on the parties to the agreement because the note was never delivered for the purpose of giving effect thereto as a valid unconditional promissory note and cites The First National Bank of Granite City, Illinois v. Draper, 266 Ill. app. 528, First National Bank of Harvey, Illinois v. Trott et al., 236 Ill. App. 412, and Straus v. Citizens Bank of Elmhurst, 164 Ill. pp. 420. In each case the payor of the note was asked by the payee to execute the note in question for purposes of making their records reflect a more stable condition than existed, either to satisfy the bank examiners or stockholders or depositors. In each instance the payor was advised he would not be held liable on the note and in each instance the note was signed to accommodate the payee and to cover a note held by the bank drawn by some person whose credit was questionable. From the affidavits filed by defendant in the case at bar it is clear the defendant did not sign the notes to accommodate



the plaintiff but to secure plaintiff in the transfer of deeds to the corporation. Whether the corporation paid off previous notes is of no importance in determining defendant's liability under the notes involved in this case. Sufficient difference in the facts exists for holding these cases not controlling in the case at bar.

In Handley v. Drum et al., 237 Ill. App. 587, the defendant purchased stock from the plaintiff and executed a note as consideration. In plaintiff's action on the note defendant testified that at the time said note was executed the parties orally stipulated "that the note should be paid only out of the dividends declared by" the company. On the trial the court gave an instruction to the effect that plaintiff could not recover, if it was orally agreed that defendants would not be liable to pay the note except from profits of the corporation, and that said corporation made no profits. In holding the instruction incorrect the court said:

"In our opinion the instruction given by the trial court was not in accord with the law of this State. The promissory note was a written contract to pay \$2,500, which was absolute in its terms. It is elementary that the defendants could not show by parol, even as against the payee of the note, that the parties had an understanding that the contract in fact was conditional. It is a fundamental part of the law of contracts, to which there are very few exceptions, that a party to a written contract may not contravert the terms of that contract by parol. But it is equally well established that such a party may show that the contract claimed to exist was in fact never fully executed, -- that although it was signed by him, he never delivered it or that there was merely a conditional delivery and that the condition has failed. In so doing, the written terms of the contract are not varied by parol but the showing made is merely to the effect that the contract never was completely



executed. Those principles apply to contracts entirely apart from negotiable instruments. Northwestern Consol. Milling Co. v. Loan, 232 Ill. App. 266; Ideal Tool & Manufacturing Co. v. Steff, post, p. 624."

And continuing the court said:

"Applying the rule to the facts presented in the case at bar, it is quite apparent that counsel for the defendants appreciated the limits and extent of the rule, for in their pleadings they set up a conditional delivery. Their pleading was 'that the note was not to take effect until sufficient dividends had been declared' upon the stock 'to amount to the face value of said note with interest.' But, in our opinion, it is equally apparent that the proof submitted did not make out the defense thus pleaded. That proof was not to the effect that the delivery of the note was conditional but that the parties had agreed that its payment was to be conditional and depend on the profits to be derived from the stock in the way of dividends. In contending the contrary, counsel for the defendants urge that this was not a delivery of the note 'for the purpose of giving effect thereto' as required by the statute before such an instrument can be considered complete and irrevocable. The evidence in this case fails to support that contention. The consideration for this note, together with the cash payment made, was 290 shares of stock of the company in which both these parties were interested. The note, together with the balance of the consideration, \$1,500 in cash, was delivered to the plaintiff and the stock was delivered to the defendant Drum and was transferred on the books of the company to his name and by means of the voting of this stock the defendant became the president of the company and proceeded to manage its affairs. That being the situation, it must be held that the defendants delivered the note 'for the purpose of giving effect thereto,' and even if, as the trial court put it in the instruction above quoted, the parties agreed prior to the execution of the note, 'that the defendants would not be liable to pay said note except from the profits ' of the company and the company made no profits, the defendants are nevertheless liable in this action because the alleged agreement did not impose a condition precedent to a complete delivery of the note but rather one which applied to the payment of the note and as this contradicted the express terms





of the note, to be binding on the parties, it must have been made in writing and could not be shown by parol. Hensley v. Mitchell, 147 Ill. App. 161; Schultz v. Meyer, 181 Ill. App. 335; Mesch v. Dennis, 194 Ill. App. 663; Weinstein v. Sprintz, 234 Ill. App. 492; First Nat. Bank of Beecher v. Wolf, 202 Ill. App. 283; Shinner v. Raschke, 213 Ill. App. 324."

In Textmeyer v. Nordlund, 259 Ill. App. 247, the court quotes from Handley v. Drum, supra, with approval and concludes:

"Where there is a failure of consideration, evidence is admissible to show the circumstances under which the note was executed and delivered as tending to show a conditional delivery and that the condition has failed; but where there is a valid consideration the payor will not be heard to say that he had an understanding that the note was conditional."

These cases are clearly in point and while it is permissible to show by parol evidence that there was a conditional delivery of a note, it is improper to show by parol that there was a condition attached to the manner of payment as tending to vary the expressed terms of a written contract. The doctrine as laid out in the foregoing cases has recently been reaffirmed in the case of Steiner v. Big-A-Jig Toy Company, 10 Ill. App. 2d 410, 136 N.E. 2d 166.

Defendant contends that he personally received no consideration for signing the note. In his affidavits defendant has stated that he is president of the corporate grantee on the deeds in question. He further states that he has an agreement with said corporation out of which he has realized and will in the future realize great profits as an independent contractor in the building of homes on the very lots conveyed by plaintiff to the corporation. And finally he states that he signed the said notes at the insistence



of the plaintiff, that he signed them in his individual capacity. There by the admissions of the defendant himself sufficient consideration is shown to support a contract. In Tegetmeyer v. Nordrund, supra, the consideration for the note signed by the defendant went directly to the bank of which defendant was a director. In a later suit on the note the court said:

"These facts tend to show a consideration for the execution and delivery of the note. The essence of the agreement was the purchase by the directors, including defendant, of the bad paper of the bank. Defendant's interest in this paper would be a sufficient consideration. Furthermore, it was of interest to defendant, as a stockholder and director of the bank, to get rid of the bad assets of the bank and to substitute assets that would meet with the approval of the examiner. The contribution made by defendant along with the other directors, would at least postpone, if not prevent, a loss following the closing of the bank. (Emphasis supplied)

"A benefit to the promisor or a loss or detriment to the promisee . . . may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered or undertaken by the other'. . . and 'may consist in a benefit to a third person.' 3 R. C. L., par. 126, pp. 930, 931."

In Farmers National Bank of Princeton v. Hosenkrans, 240 Ill. App. 230, the court said it is not indispensable that the consideration pass directly to the promisor but any act which is a benefit to one party or a disadvantage to the other constitutes a sufficient consideration to support a contract. Schlatter v. Triebel, 284 Ill. 412, Dickinson v. McKay, 177 Ill. App. 412, People v. Commercial Life Ins. Co., 247 Ill. 92.

By the affidavit of the defendant it is clear that the plaintiff agreed to convey certain lots to the corporation upon the

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plaintiff agreed to convey certain land in the New Mexico upon the

defendant's signing the notes in question. Under these facts it appears that there is sufficient consideration to support the contract for here alone, a clear disadvantage is shown to plaintiff. However, in addition to that, by his affidavit defendant has established that certain benefits would accrue to him out of the transaction as a whole and it is clear that the defendant at the time of the execution of the notes in question contemplated not only that the corporate grantees would receive certain benefits from the transaction, but that he himself would be benefitted to a great degree.

The issues presented by the affidavits of the defendant if established by competent testimony in court and taking them to be true do not warrant the opening the judgment. The judgment of the Circuit Court of Champaign County is affirmed.

Affirmed.

(Carroll, P.J., Reynolds, J., concur.)



STATE OF ILLINOIS  
APPELLATE COURT  
THIRD DISTRICT

16 I.A. 373

February Term, A. D. 1958

General No. 10140

Agenda No. 10

|                        |   |                  |
|------------------------|---|------------------|
| Winifred Titus Sentel, | ) |                  |
|                        | ) |                  |
| Plaintiff-Appellee,    | ) |                  |
|                        | ) | Appeal from the  |
| vs.                    | ) | Circuit Court of |
|                        | ) | Moultrie County  |
| Lula P. James,         | ) |                  |
|                        | ) |                  |
| Defendant-Appellant.   | ) |                  |

Roeth, J.

Defendant appeals from a decree of the Circuit Court of Moultrie County by which the court found that plaintiff had an equitable lien on certain city real estate standing in the name of defendant, to secure the payment of \$12,635.94. The decree directed the payment of said sum to the plaintiff within ninety days and in default thereof, that said real estate be sold at public sale to satisfy payment.

By the complaint it was alleged in substance that plaintiff made two advancements to defendant and her deceased husband, one in 1952 in the sum of \$7,777.94 and the other in 1955 in the sum of \$5,241.00; that the first advancement was used by defendant and her deceased husband to acquire title by deed in joint tenancy of the real estate in question, subject to an outstanding mortgage

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and the latter advancement was used to retire and pay off the mortgage; that defendant and her deceased husband orally agreed that the real estate should stand as security for repayment of said advancements and that subsequent to the decease of defendant's husband the defendant restated, reiterated and renewed the oral agreement. The answer admitted the advancements and admitted that certain payments were made by defendant and her deceased husband to plaintiff on account of said advancements but denied the oral agreement and alleged that said advancements were gifts. On the issues thus made a trial was had before the court without a jury which resulted in findings for the plaintiff and the decree hereinbefore referred to.

At the outset, counsel for plaintiff concedes that the record in this case, first of all, presents a fact question as to whether the advancements which were concededly made, were gifts or loans. We have carefully examined the testimony and find that the testimony of plaintiff and defendant is in direct conflict on this factual question. With one important exception, i.e., that certain cash payments were made to plaintiff and a certain credit for professional services was given by plaintiff on the advancements made to defendant and her deceased husband. As to these facts there is no dispute. In many respects the testimony of the plaintiff is corroborated by facts and circumstances appearing in the record. There is some corroborating evidence of the defendant's version of what transpired. A determination of the factual issue, therefore

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becomes essentially a question of credibility of the witnesses and this question involves a consideration of numerous factors. As was said in Kettlewell v. The Prudential Insurance Company of America, 4 Ill. 2d 383, 122 N.E. 2d 817:

"The jury and the trial judge watching and studying every expression and action on the part of the witnesses were in a better position to adjudge their credibility than a reviewing court who has only the printed page to rely upon.

\* \* \*

"The language in the opinion of the Missouri court in Creamer v. Bivert, 214 Mo. 473, 113 S.W. 1118, is strikingly appropriate. 'He (trial court) sees and hears much we cannot see and hear. We well know there are things of pith that cannot be preserved in or shown by the written page of a bill of exceptions. Truth does not always stalk boldly forth naked, but modest withal, in a printed abstract in a court of last resort. She oft hides in nooks and crannies visible only to the mind's eye of the judge who tries the case. To him appears the furtive glance, the blush of conscious shame, the hesitation, the sincere or the flippant or sneering tone, the heat, the calmness, the yawn, the sigh, the candor or lack of it, the scant or full realization of the solemnity of an oath, the carriage and mien. The brazen face of the liar, the glibness of the schooled witness in reciting a lesson or the itching overeagerness of the swift witness, as well as honest fact of the truthful one, are alone seen by him. In short, one witness may give testimony that reads in print, here, as if falling from the lips of an angel of light and yet not a soul who heard it, nisi, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify.'"

The trial judge in a memorandum opinion expressly noted, that in arriving at the conclusion that the advancements were not gifts, he took into consideration the conduct and demeanor and attitude

becomes essentially a question of credibility of the witness. The witness must be able to give a credible account of the events which took place, and this question involves a consideration of the witness's character, his reputation for truthfulness, and his ability to observe and recall the events which took place.

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we took into consideration the output and demand and still the arriving at the conclusion that the experiments were not 1953, the trial judge in a memorandum of decision dated, that I

of the witnesses while testifying. We do not deem it necessary to recite the evidence in detail. Suffice it to say that the conclusion reached by the trial judge is amply supported by the evidence. His findings of fact are entitled to the same weight as a jury's verdict and we would not be justified in disturbing this finding.

Counsel for defendant next contend that even though it may be held that the advancements were not gifts, that then the most that can be said is that they were loans and that equity has no jurisdiction to impress a trust or equitable lien on the real estate for their repayment. Counsel for defendant devote considerable space in their brief to a citation of cases involving resulting trusts and a discussion of what is required to the establishment of a resulting trust. The answer to this is that the decree does not find that there is a resulting trust and further, counsel for plaintiff makes no contention that the facts in this case bring it within the doctrine of resulting trusts. In fact, counsel for plaintiff both in the brief filed and on argument, affirmatively assert that this is an equitable lien case.

On the equitable lien theory, counsel for defendant contends that an express executory agreement in writing must exist in order to create an equitable lien and cites in support thereof Watson v. Hobson et al, 401 Ill. 191, 81 N.E. 2d 885; Byron v. Byron et al, 391 Ill. 256, 62 N.E. 2d 790; Aldrich, Trustee v. The P.J.

The witness was interviewed by Special Agent [redacted] on [redacted]. The witness stated that he did not see any other persons at the time of the shooting.

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Ederer Company, 302 Ill. 391, 134 N.E. 726.

In Watson v. Hobson et al, supra, the court set forth the general theory of equitable liens as follows:

"An equitable lien is the right to have property subjected, in a court of equity, to the payment of a claim. It is neither a debt nor a right of property but a remedy for a debt. It is simply a right of a special nature over the property which constitutes a charge or encumbrance thereon, so that the very property itself may be proceeded against in an equitable action and either sold or sequestered under a judicial decree, and its proceeds in one case, or its rents and profits in the other, applied upon the demand of the creditor in whose favor the lien exists. (Aldrich v. E. J. Ederer Co., 302 Ill. 391, 134 N.E. 726; Kukuk v. Martin, 331 Ill. 602, 163 N.E. 391.) Equity recognizes, in addition to the personal obligation, in some cases, a peculiar right over the thing concerning which a contract deals, which it calls a "lien," and which, though not property, is analogous to property, by means of which the plaintiff is enabled to follow the identical thing and to enforce the defendant's obligation by a remedy which operates directly upon that thing. (Kukuk v. Martin, 331 Ill. 602, 163 N.E. 391.)"

And in Phelps v. Oak Hills Golf Club et al, 269 Ill.

App. 397, the court said:

"The theory of equitable liens has its foundation in contracts, express or implied, and every agreement between the contracting parties which sufficiently indicates an intention to make some particular property, real or personal, a security for a debt; or the property is transferred as a security, creates an equitable lien, which is enforceable against the property conveyed. This rule, however, is not limited to express contracts, but in addition equity raises similar liens without agreement therefor between the parties, based either upon general considerations of justice or upon the particular equitable principle that he who seeks the aid of equity in enforcing some claim must himself do equity. Oppenheimer v. Szulerecki, 297 Ill. 81."

It is true that in the cases cited by counsel for defendant, supra, there is language in the discussion of the doctrine of





equitable liens that might indicate that the agreement was required to be in writing. Close examination of the cases reveals that in each instance any such language was not necessary to a decision based upon the facts of the particular case.

In Grigaitis v. Gaidauskis, 214 Ill. App. 111, an equitable lien was impressed upon real estate upon the basis of a loan of money to defendants and an oral promise by them to execute a mortgage if the loan was not repaid within one year. There the court held:

"The law is well stated in Pomeroy's Equity Jur. sec. 1237: 'The form or particular nature of the agreement which shall create a lien is not very material, for equity looks at the final intent and purpose rather than at the form; and if the intent appear to give, or to charge, or to pledge property, real or personal, as a security for an obligation, and the property is so described that the principal things intended to be given or charged can be sufficiently identified, the lien follows.' That language has been quoted and sanctioned in many cases in various jurisdictions. Where one furnishing a consideration is promised a mortgage on certain specified real estate, an equitable lien is thereby created. Pursuant to the maxim that equity will consider that which ought to be done as already in being, the promise to give a mortgage to secure a loan may be treated as an actual mortgage. Lohmeyer v. Durbin, 206 Ill. 574."

To like effect are the cases of Boucek v. Pondelicek et al, 259 Ill. App. 59 and Baker v. Baker, 6 Ill. App. 2d 557, 128 N.E. 2d 616, in both of which cases the agreement was oral. Nor does the agreement have to be express. The trend of modern decisions is to hold that in the absence of an express contract, a lien based upon fundamental maxims of equity may be implied and declared by a



court of equity out of general considerations of right and justice as applied to the relationship of the parties and the circumstances of their dealing. There is evidence in this record which indicates that the parties intended the real estate to stand as security for the debt. Plaintiff testified that on one occasion she reminded the defendant and her deceased husband that life was uncertain and if anything happened to her it was understood that the real estate would become a part of her estate, to which they acceded; that after the death of defendant's husband, the defendant suggested they treat the house as a bond; that she demanded a deed on one occasion in order to be able to show it as a part of her estate. While this testimony is in part denied by defendant, such denial only raised a fact question of what transpired for determination by the trial judge. Viewing the record as a whole we hold the opinion that the evidence was sufficient to bring this case within the general principles heretofore referred to.

Defendant contends that the trial judge erred in his rulings on the admission and rejection of evidence. We have examined the specific complaints made by counsel for defendant in this regard in their brief and are of the opinion that in any event the errors claimed could not affect the ultimate conclusion reached.

Accordingly the decree of the Circuit Court of Moultrie County will be affirmed.

Affirmed.

Carroll, P.J. and Reynolds, J., concur.



FILED

FEB 25 1958

PAUL V. WUNDER  
Clerk Appellate Court Second DistrictIN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT  
(First Division)  
FEBRUARY TERM, A. D. 1958

161.A. 374

RICHARD W. PELUSO,

Plaintiff-Appellant,

vs.

ANTHONY RIZZO,

Defendant-Appellee.

Appeal from the Circuit

Court of Winnebago

County, Illinois.

SPIVEX--J.

A jury in the Circuit Court of Winnebago County returned a verdict for the plaintiff, Richard W. Peluso, in the amount of \$2,351.46 upon an oral contract of employment. Judgment was entered on the verdict. Defendant filed post-verdict motions for a new trial and for judgment notwithstanding the verdict. The trial court denied the motion for new trial and granted defendant's motion for judgment notwithstanding the verdict. Plaintiff appeals from the judgment entered for the defendant after vacating the judgment for plaintiff on the verdict.

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The single question presented by this appeal was whether or not the trial court erred in entering judgment for the defendant notwithstanding the verdict.

I. L. P. Judgments, Sect. 123 states the law in Illinois to be,

"The motion for judgment notwithstanding the verdict, as it was formerly designated in Illinois, admitted that the evidence most favorable to the adverse party was true, together with all legitimate conclusions and inferences, and the question of law was whether, when all the evidence was considered together with all reasonable inferences therefrom in its aspect most favorable to the party against whom the motion was directed, there was a total failure or lack of evidence to prove any necessary element of the case of such party.

"In ruling on the motion, the court could not weigh the evidence and all contradictory or explanatory circumstances were rejected when considering the evidence. The court could not determine any controversial questions of fact or pass upon the credibility of witnesses or consider any purported impeachment. Evidence which had no probative force could not be considered in passing on the motion.

"A judgment notwithstanding the verdict could be entered only when under all the evidence in the case it would have been the duty of the court to direct a verdict without submitting the case to the jury. If there was any evidence fairly tending to prove the material elements of the case the motion was denied, even though the court was of the opinion that a verdict for the adverse party was or would be against the preponderance of the evidence.





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This general principal of law has been followed in a multitude of cases among which are, Goodman v. Motor Products Corp., 9 Ill. App. 2d 38, 132 N. E. 2d 338; Danhof v. Osborne, 10 Ill. App. 2d 529, 135 N. E. 2d 492; King v. Mid-State Freight Lines, 6 Ill. App. 2d 159, 126 N. E. 2d 868; Thomas v. Douglas, 1 Ill. App. 2d 261, 117 N. E. 2d 417; Schlesna v. Gambino, 1 Ill. App. 2d 173, 116 N. E. 2d 926; Geraghty v. Burr Oak Lanes, Inc., 5 Ill. 2d 153, 125 N. E. 2d 47; and City of Monticello v. LeCrona, 414 Ill. 550, 111 N. E. 2d 338.

This court in Goodman v. Motor Products Corp., 9 Ill. App. 2d 57, at page 84 said,

"We are of the opinion that the Trial Court erred in granting the motion for judgment notwithstanding the verdict as said motion presents the single question whether there is in the record any evidence which, standing alone and taken with all its intendments most favorable to the party resisting the motion, tends to prove the material elements of his case. Wiik v. Hagen, 410 Ill. 158 at p. 161; Seeds v. Chicago Transit Authority, 409 Ill. 566; Lindroth v. Walgreen Co., 407 Ill. 121 at 130; Gorczynski v. Nugant, 402 Ill. 147 at p. 156; Weinstein v. Metropolitan Life Ins. Co., 389 Ill. 157 at p. 576. We are not concerned with the weight or credibility of the evidence, but only with the narrow question whether there is any evidence, together with all reasonable inferences to be drawn therefrom, which would justify submission of the case to the jury. Lindroth v. Walgreen Co., *supra*, at p. 130. In passing on a motion for judgment notwithstanding the verdict, the court must consider all the evidence with all reasonable

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is any evidence, together with all reasonable inferences  
be drawn therefrom, which would justify a verdict in the case  
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inferences therefrom in the aspect most favorable to the party against whom the motion is directed, and all contradictory or explanatory circumstances must be rejected. Baker v. City of Granite City, 311 Ill. App. 586."

In applying the rule heretofore announced to the instant case we believe a complete recitation of the facts would unnecessarily lengthen this opinion.

The record discloses that the defendant asked the plaintiff who lived in Brooklyn, N. Y. to move to Chicago, Illinois and to work for him in the produce business. The defendant agreed to pay the sum of \$100.00 per week and the defendant agreed to pay plaintiff's moving expenses from Brooklyn to Chicago. Plaintiff agreed to work for the defendant and he incurred moving expenses; plaintiff worked for the defendant and defendant payed him some salary but not all that was due under the agreement nor did defendant reimburse plaintiff for his moving expenses.

We find that this evidence standing alone and taken as true with all intendments most favorable to the plaintiff required the case to be submitted to the jury and that the trial court erred in entering judgment notwithstanding the verdict in the face of this evidence and under the applicable rules of law herein announced.

judgment of the  
The/Circuit Court of Winnebago County is reversed and in view of the fact that there are no further questions for the trial court to pass upon, judgment is entered in this court for the plaintiff and against the defendant in the amount of \$2,351.46 and costs.

¶ Reversed and Judgment here.

¶ Dove P.J. and McNeal, J., concur

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47442

ROBERT W. LINDSLEY, WILLIAM H. FUNKE,  
BURTON GIBSON, HOWARD B. AHARA,  
RICHARD D. STOCKTON, a copartnership  
doing business under the style and  
name of CONSOLIDATED AGENCY,  
Plaintiffs-Appellants,

v.

BENEFIT ASSOCIATION OF RAILWAY EMPLOYEES,  
a corporation, and PAUL E. KELLER,  
AMMON L. MILLER, JOHN W. CREWS, JOHN H.  
LUMLEY and JOHN E. BILSBORROW, each  
individually and as an officer and  
director of BENEFIT ASSOCIATION OF  
RAILWAY EMPLOYEES, a corporation,  
Defendants-Appellees.

16 I.A. <sup>2d</sup> 375

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

PER CURIAM.

This is an appeal from an order of the Circuit court of Cook county in a suit for a declaratory judgment, denying plaintiffs' motion for a temporary injunction without bond, restraining defendants from terminating a contract between plaintiffs and defendant, Benefit Association of Railway Employees (Association), hereinafter referred to as defendant, and from interfering with plaintiffs in the performance of the contract now existing between them, and from interfering with the occupancy by plaintiffs of space now used by them for offices in the office building of defendant, or charging for such use and occupation or for clerical help, telephone facilities, stationery and office supplies used by plaintiffs in the carrying out of their duties under the contract. As termination of the contract becomes effective March 1, 1958, we gave the matter immediate consideration.

Plaintiffs are a copartnership doing business as Consolidated Agency. The Association is a mutual legal reserve life insurance association. Under a contract which with



modifications and assignments from time to time has been in existence since 1913, plaintiffs and their predecessors have been acting as what they designate "Organization Directors," having charge for the Association of negotiating franchises or payroll deduction privileges and rights incidental thereto with railroads, other public carriers, industrial or commercial companies, and other organizations or groups with which the Association desires to do business and in addition thereto to find, investigate, negotiate with and recommend to the Association suitable soliciting agents and to train and supervise the activities of those agents in accordance with the directions of the Association. Such soliciting agents were appointed by the Association and were removable by the Association. It was specifically provided that plaintiffs should not solicit, procure, write, produce, negotiate, effect, place, issue or countersign policies or contracts of insurance, nor inspect nor service risks. For their services plaintiffs were to be paid a commission and out of this commission were to pay the costs of their performance of the contract and in addition all commissions due to the soliciting agents appointed by the Association. It is not necessary to go into the various other duties and limitations prescribed in the contract.

Plaintiffs charge that the contract having been in existence for many years and the business of the Association having greatly increased, defendants undertook to dispense with plaintiffs' services and to take over the business which they, plaintiffs, had built up, and having so determined, served notice on plaintiffs that they would terminate the contract, and proceeded to harass and obstruct plaintiffs in the performance of their duties under the contract by failing to furnish on an orderly basis necessary agents' supplies





upon request therefor, by failing to permit plaintiffs' agents to write insurance in areas where defendants state they contemplate appointing general agents, by refusing to do direct mail advertising in areas where defendants state they contemplate appointing competing general agents, by failing to file forms in a timely manner to comply with state insurance regulations, by employing unfair methods of competition in the solicitation of business, by threatening to discontinue payment of overwriting commissions due plaintiffs in connection with certain classes of insurance, by threatening to deduct from commissions due plaintiffs excessive and arbitrary charges fixed by defendants for clerical service and office space, and by imposing arbitrary, inconsistent and unrealistic standards of performance upon plaintiffs. The complaint further alleges that pursuant to this campaign, defendants by letter dated January 30, 1958, served notice that they would terminate the contract effective March 1, 1958. The complaint charges that plaintiffs have no adequate remedy at law; that the damages which would be assessable against defendants are so vast, the difficulties to determine adequately said damages so manifold, and the injuries resulting to plaintiffs so substantial, that the remedies at law are not adequate.

As the matter was heard on the complaint and the exhibits attached thereto, we take these averments to be true for our purposes. After reading and examining the complaint and attached exhibits we have come to the conclusion that the contract is clearly a contract for personal services and that no title in or rights to property are involved. The relationship between the parties is obviously one of principal and agent, and this agency is not coupled with an interest in the business. The issue presented to us, therefore, is whether



under these circumstances the chancellor in the exercise of a proper discretion should have granted the injunction.

The granting or refusing of a temporary injunction rests largely in the discretion of the chancellor to whom the application is made. O'Brien v. Mutual, 14 Ill. App.2d 173. It is true that it is not necessary to make a showing that will be completely convincing of the ultimate success of the party seeking the injunction, but the extent to which a court should be convinced of the ultimate result depends upon the character of the litigation and in what manner the status quo is being maintained. We had occasion to consider the nature of status quo as related to the issuance of a temporary injunction in Chicago Motor Coach Co. v. Budd, 346 Ill. App. 385. We there pointed out that the preservation of a status quo which holds intact some physical object or a joint savings account or the current possession of securities in a responsible neutral person may be commanded by a court without substantial harm to the person enjoined if the injunction should prove to have been improvident. On the other hand, the maintenance of a status quo which preserves one party in association with another in the rendering of services which are lucrative and continuous as against the demand of the other who claims he has a right to take it over or to compete is not really preserving a static situation and may do irreparable injury to the person enjoined if in the end he should prove to be successful in the litigation. The instant litigation is obviously of the latter kind, and in such a case the constant and persistent adjuration that this extraordinary relief should not be granted unless the right to it is clear and certain, as contained in decisions and texts over centuries of Anglo-Saxon



law, is especially significant.

Confessedly, the relief sought is the equivalent of specific performance of the contract. A temporary injunction would require specific performance for the period for which the injunction was in effect, that is, would require the parties to continue a relationship which, by the very description of the acts set forth in plaintiffs' complaint and the details of the relief they seek, demands a cooperative and harmonious spirit on both sides.

Moreover, plaintiffs seek this injunction without bond. Their only excuse for noncompliance with the statute (Ill. Rev. Stat., 1957, Ch. 69, Par. 9) in this respect is that the large amount involved would require a bond so great that plaintiffs are not able to obtain one for a premium within reason. In other words, the risk is too great. The statute provides that before an injunction may issue, the plaintiff shall give bond in such penalty, upon such condition and with such security as may be required by the court or judge, provided the bond need not be required when, for good cause shown, the court or judge is of the opinion that the injunction ought to be granted without bond. The facts presented do not warrant the issuance of an injunction without bond. On the contrary, it appears to us that if an injunction were proper, it could only be conditioned upon a substantial bond being filed.

It is also clear from the averments of the complaint itself that adequate remedy can be obtained by way of money damages whether in equity or at law. The only argument in support of plaintiffs' position is that their damages would cover large sums accumulated over a long period of time;



that they have an interest in renewals which would be jeopardized, and some further vague charges of possible insolvency. They themselves estimate their damages. It is not necessary to inform competent counsel for plaintiffs of the various procedures available to obtain the necessary proof of damages. All this appears to make the extraordinary relief sought not only unwise but unnecessary.

As this is the last day before the date set forth in the notice for termination of the contract, the parties are entitled to have our decision at once. That has not left ample time to discuss the various authorities cited by both sides.

Order affirmed.

Abstract only.





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46686

SIDNEY FOREMAN and  
RUTH FOREMAN,

Appellees,

v.

HENRY K. HOLSMAN, WILLIAM T.  
HOLSMAN, H. G. CROLL, L. E.  
ADAMS JR., and THE TRUST  
COMPANY OF CHICAGO, an  
Illinois corporation,

Appellants.

16 I.A.<sup>2d</sup> 466

APPEAL FROM CIRCUIT  
COURT, COOK COUNTY.

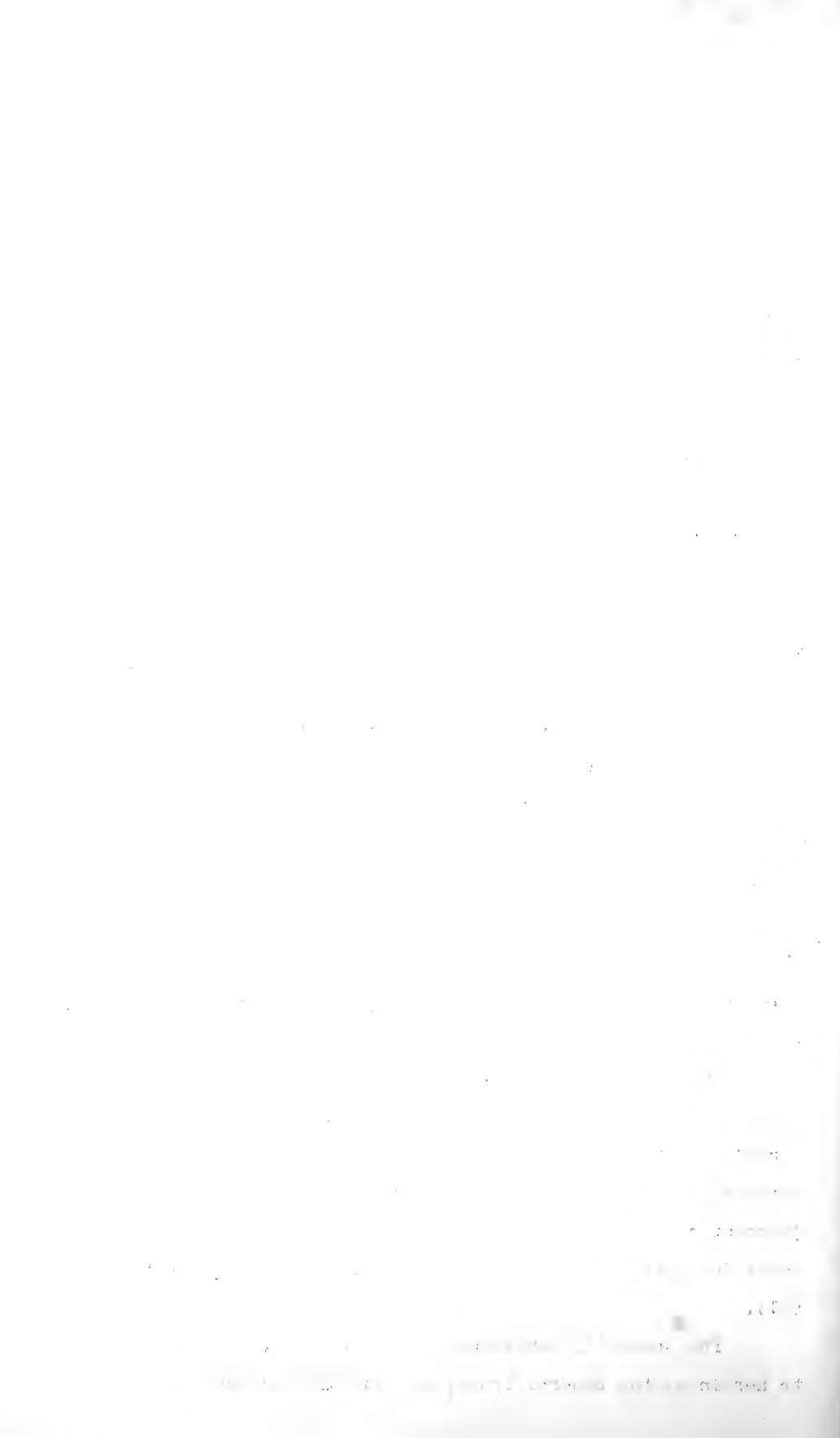
MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an action under the Illinois Securities Law (Ill. Rev. Stat., 1951, chap. 121-1/2, pars. 96-137) to set aside, as void, a sale to plaintiffs of 60 shares of beneficial interest in the Jackson-Laramie Mutual Ownership Trust. The master found for plaintiffs that the transaction was a security, sold in violation of the Securities Act, and recommended a "decree" in favor of plaintiffs. A judgment was entered accordingly for \$6,000, plus attorney's fees of \$1500, and costs.

Defendants, except the Holsmans, have appealed.

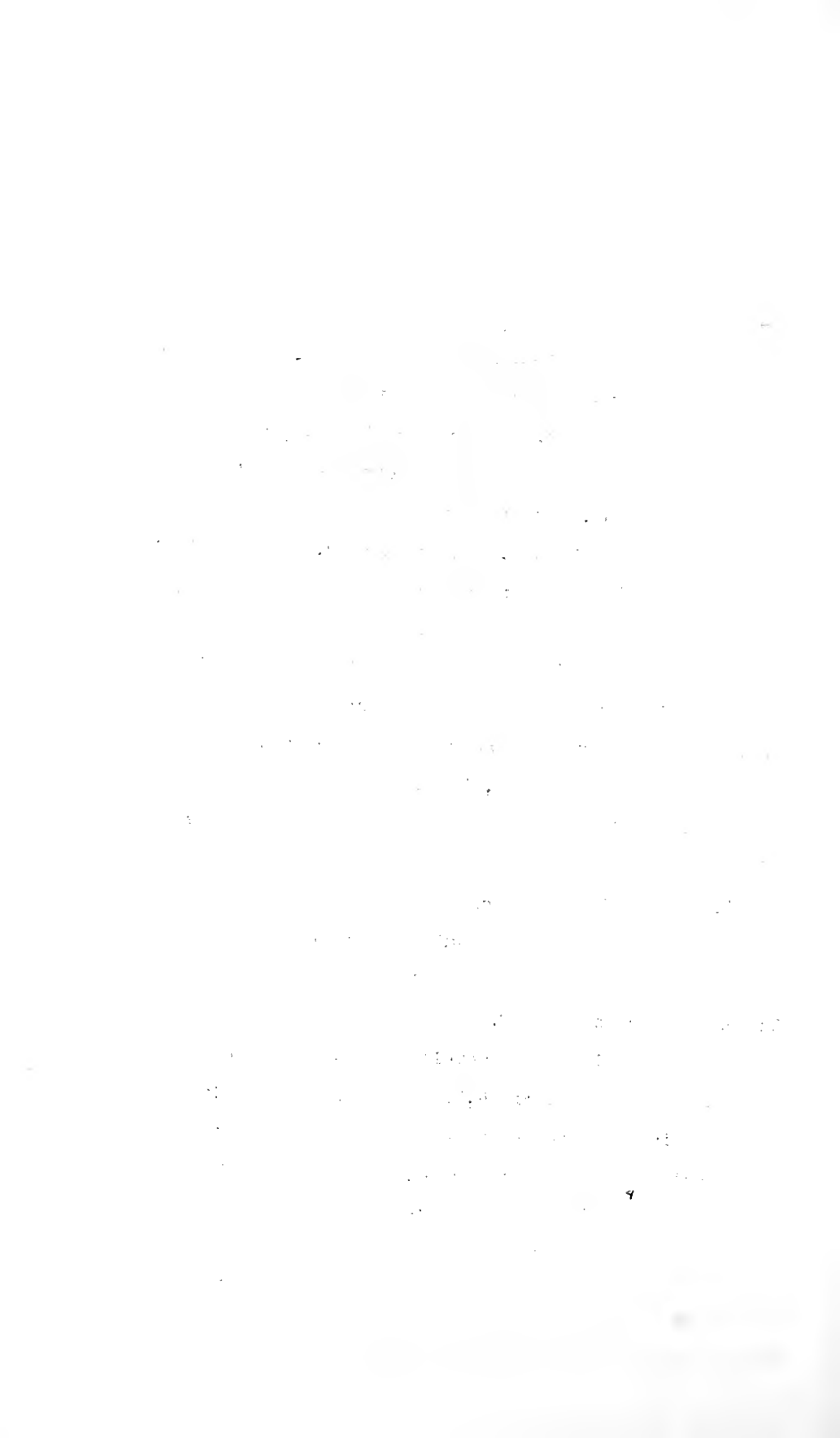
This court, in 9 Ill. App.2d 317, reversed the judgment on the ground that plaintiffs' action was barred by a release they had given defendants. The Supreme Court granted leave to appeal and reversed the judgment of this court and remanded the cause to this court for determination of the remaining issue (10 Ill.2d 551).

The Community Development General Trust, referred to herein as the General Trust, was established for the



declared purpose of sponsoring low cost housing developments. The means used was the creation of special trusts for specific projects. On January 23, 1950, the Jackson-Laramie Special Trust, referred to herein as the Special Trust, was established for a development on the West Side of Chicago. On October 27, 1950, plaintiffs signed a Mutual Ownership Application and deposited \$100 earnest money with defendant Adams. On November 3rd plaintiffs were notified in a letter from the Special Trust Service Agents, by defendant Croll, that their application for mutual ownership and a lease had been approved. On November 10, 1950, plaintiffs signed a Mutual Ownership Agreement and gave Croll a check for \$6,000, taking back the earnest money. June 12, 1951, Certificate Number Five for 60 shares of beneficial interest in the Jackson-Laramie Garden Homes Mutual Ownership Trust was issued to plaintiffs by defendant Trust Company as trustee.

The Special Trust development contemplated 352 apartments at a cost of \$4,200,000. Approximately \$600,000 in certificates were issued for interests in the Special Trust and, of these, certificates of the value of about \$140,000 were used to acquire the land. Difficulties arose in the development of the project, which eventuated in the bankruptcy of the General Trust and of the Holsmans' architectural firm, prime promoters of the General Trust housing scheme.



Plaintiffs learned that the contemplated buildings were not proceeding beyond foundations. They consulted an attorney, who discovered the certificates which were issued had not been registered under the Illinois Securities Act. This suit followed a written demand for the return of plaintiffs' money.

The vital question is whether the sale was of a security transaction or of an interest in real estate. It is conceded that if the instant transaction is a "security" there was a violation of the Illinois Securities Act.

In the Mutual Ownership Application plaintiffs were promised that the "Choice of Dwelling Units" would be assigned applicants in order of time of application, and that 5% interest per annum would be paid on all cash deposits made prior to the occupancy of the assigned dwelling unit. Subsequently they received a letter from Holsman, Holsman, Klekamp & Taylor, 39 South State street, notifying them the Application for Mutual Ownership and their Application For Lease of Space, Apt. DL-2, Bldg. #10, had been accepted. The letter was signed by the Holsman firm as Service Agents, Jackson-Laramie, H. G. Croll.

Later plaintiffs signed the Mutual Ownership Agreement, stating they had read the trust agreement and desired to participate in the "mutual development and ownership." The Trust accepted the funds "as the required beneficial interest and to qualify as an A



Shareholder"; agreed to deliver the funds to the Trustee, which would later issue the certificate evidencing the value of plaintiffs' interest and their right to share in the net "proceeds and avails"; that the funds would be used at the discretion of the Trust, according to the terms of the Trust Agreement, for expenses, land, etc., plus a "10% mark-up," the residue of which, after Trustees' and financing charges, was to be vested in Community Development General Trust No. 4130; and that a "corresponding General Trust Certificate of Interest" would issue to the Jackson-Laramie Special Trust.

The Certificate provided that "Dividends" were payable "when, as and if earned." Shares were to be A and B "revertible"; B's could be issued to any person, nonresident or resident on the property; A shares issued only to resident lessees to the extent of the holder's equity values, the balance of shares to be B, and should the lease terminate, the A's to revert to B; the appraised market rental to be fixed by the Managing Trustees but A shareholder leases "may" contain a provision whereby rent could be reduced by a lessee performing certain of his own services and by any "dividends" due; and that the holder had no interest in the property as such but only in the "net income," "avails" and in the assets on liquidation.

The transaction did not bind defendants to enter into a lease with plaintiffs, nor was there a meeting of the minds on the terms so as to make a claim for lease





enforceable. And if plaintiffs eventually obtained a lease, they would have to pay the "market value rent" during a period terminable at the end of one year on sixty days' notice. Since defendant could lease apartments to persons not holding Certificates, plaintiffs would be competing with the public generally for a lease. Furthermore, they had virtually no control over the Trust, and whatever financial benefits they received would come from the efforts of others. For these reasons we conclude the transaction was a security subject to the Illinois Securities Act. Sire Plan Portfolios, Inc. v. Carpentier, 8 Ill. App.2d 354.

The next question is whether the Trustee was liable. The master found that it held itself out as protecting investors in the Trust, retained significant powers and was accordingly liable. Plaintiffs contend the Trustee was liable as a "seller" under the Act, "\* \* \* and the seller of the securities so sold, the officers and directors of the seller, and each and every solicitor, agent or broker of or for such seller, who shall have knowingly performed any act or in any way furthered such sale, shall be jointly and severally liable \* \* \*." (Ill. Rev. Stat. 1951, chap. 121-1/2, par. 132.) The Act does not define a "seller."

The master found that the Trustee performed only ministerial duties except on direction from the Managing Trustees, but that it could, under the Agreement, do more



than it did, and the master noted plaintiffs' contention that the powers granted the Trustee were not exercised because the project failed. He concluded that the Trustee held itself out as protector of the investor and reserved powers of protection, the only protection available to investors, and that the Trustee should have refused to act and to issue the certificates until the Securities Act was complied with. For these reasons it recommended the decretal finding that the Trustee was a seller.

We agree with plaintiffs that the Trustee's position was different from that of a land trustee, and that the amount of its fee is of little importance on the issue. Wehrwein v. Eastman Springs Beverage Co., 238 Ill. App. 443. The land trustee cannot act independently as the Trustee could in this case. The master's finding that the Trustee was an ostensible protector is supported by a statement in the preamble to the Trust Agreement that "students of the problem" had found that Managing Trustees, "acting under the power of a well established and conservative Trust Company Trustee," would best serve to accomplish the Special Trust purposes. It was not necessary that the Trustees have any dealing directly with plaintiffs, since in general it made the project possible under the means employed. Abrams v. Love, 254 Ill. App. 428. And under this conclusion it is immaterial that the Trustee's first contact with plaintiffs was several months after they had paid their money. Also, it was more than an issuer. We



think that the Trustee knew, or should have known, that it would issue Certificates to investors like plaintiffs, and that having the power to refuse to issue the Certificate, should have refused to do so until the Securities law was complied with.

The Trustee reserved significant powers. It is not necessary to state them all. Though the Trust Agreement stated the Trustees were solely responsible for the Trust administration, there were several important functions requiring concurrence, or joint action, of the Trustees. The Agreement made the Trustee's powers "subject always" to the direction of the Trustees. The former could veto any direction it considered "illegal, immoral or contrary" to the Agreement without liability for the "exercise or non-exercise" of the veto. In case its demands for direction were not forthcoming it could act in "absolute discretion" in situations where it was "authorized or required" to act. The Agreement lodged effective control in the Trustee because of its powers to prevent removal and increase or decrease the number of Trustees and to make appointments, with the consent of 51% of the shareholders, whenever its recommendations to increase were not followed. That the Trustee did not exercise these powers does not show it had no control. The powers themselves seem to be the relevant factors, for in the Sire case, 8 Ill. App.2d 354, the Secretary of State had prohibited sale of fractional interests in real estate. The trial court, on review



from the administrative order, considered the Plan and affirmed the order. This court sustained the trial court.

No cases cited by defendants militate against this conclusion. In Jaffe v. Goldner, 251 Ill. App. 188, the court decided only that a deed of trust, under which a bank held legal title to property, did not represent assets of the bank so as to be a Class A Security, except under the Act. In Caldwell v. Cole, 326 Ill. 502, the evidence failed to show that the sale to Caldwell was by Cole. In Hammer v. Sanders, 8 Ill.2d 414, the majority opinion found that the instruments, as construed by the conduct of the parties, did not, except in six of the transactions, involve sales of securities. We think the Securities Act cases describe sellers, who are liable, sufficiently to render technical definition of that term inapplicable. We are of the opinion that the Trustee was a "seller" and therefore liable.

Defendants Croll and Adams were employees of the architectural firm of the Holsmans. They actively participated, as agents of the Jackson-Laramie Special Trust, in the transaction with plaintiffs. The master found they had furthered the sale in violation of the Act, and that they were liable as solicitors or agents under the Act. The finding is justified, since the Holsman firm furnished the personnel, including Adams and Croll, to operate the Jackson-Laramie Trust, and to solicit sales of shares and to close transactions. The Trust, operating





through the Trustee and Trustees, was the ultimate seller, and by reason of their relationship with it, they were its solicitors or agents. We think the master's finding as to their liability was correct.

There is no showing of an abuse of discretion in the trial court's denying leave to Pierce to intervene. The Trustee was presumably represented adequately and no showing that a full and complete determination of the issues could not be had without intervention. Hairgrove v. City of Jacksonville, 366 Ill. 163, 184. The fact that Pierce is a partial indemnitor of the Trustee does not alter the rule.

For the reasons given the judgment is affirmed.

AFFIRMED.

Lewe and **Murphy**, JJ., concur.

Abstract only.



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47212

REINSURANCE AGENCY, INC., an  
Illinois Corporation,

Plaintiff - Appellee,

v.

FOREMOST INSURANCE AGENCY, INC.,  
an Illinois Corporation,

Defendant - Appellant.

16 LA. 467<sup>2d</sup>  
APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is a suit on an oral contract for insurance premiums. The defendant denied any agreement on its part to pay any premiums and, therefore, denied net liability. The court without a jury found the issues in favor of the plaintiff, Reinsurance Agency, Inc., and entered judgment accordingly. The defendant appeals.

The basic question presented here is whether the judgment is against the manifest weight of the evidence.

It is agreed that in the latter part of October, 1955, the defendant corporation, through its president, Seymour Rosenfield, contacted the plaintiff concerning the issuance of fleet line insurance for defendant's client, Chicago Heights Midway Motor Express Co. Charles Cram, vice-president of the plaintiff company, agreed to issue the policies and pursuant to this conversation, on or about November 15, 1955, the policies went into effect. These policies remained in effect until March 15, 1956, when they were cancelled for nonpayment of premiums.



It was stipulated that the premiums for the period from November 15, 1955 until March 15, 1956 amounted to \$2,080.18. The defendant was given a credit for \$400 paid to the plaintiff by the defendant's check dated April 24, 1956. The prayer asks for the balance of \$1,680.18.

The testimony concerning the existence of an express contract is conflicting. Cram, testifying in behalf of the plaintiff, stated that on two occasions, 60 and 90 days respectively, subsequent to the issuance of the policies, he talked to Rosenfield regarding the premiums which were then delinquent. Cram related that in these conversations on the telephone, when he told the defendant's president he was going to cancel, Rosenfield said, "not to worry," that he "would guarantee the payment of all the premiums" and finally "he would be responsible for the premiums and not to cancel." At the end of 120 days, they decided to cancel the policies. Rosenfield denied that he had told the plaintiff he would guarantee the payment of the premiums.

Subsequent to cancellation of the policies, the plaintiff received two of the defendant's checks, dated April 24, 1956 and June 23, 1956, in payment of the premiums. The latter check was in the amount of \$300, but payment was stopped by the defendant before it could be collected. The defendant alleges that this was due to the fact that the defendant's only obligation was to forward to plaintiff payments actually received from the insured, and that its "stop payment" order was issued when the check of its co-broker, Murray, in the same amount was not honored. Cram and Rosenfield were the only witnesses produced at the trial.



The defendant argues that where the testimony of the plaintiff and defendant are in direct conflict and the record discloses no corroborating circumstances favoring either party, an affirmative statement by one met by a flat categorical denial by the other, when they are of equal credibility, does not meet the requirement of law that a plaintiff must make out his case by a preponderance of the evidence, citing McCue v. Flynn, 327 Ill. App. 222, Miller v. Scandrett, 326 Ill. App. 63 and Brougham v. Paul, 138 Ill. App. 455, and other cases in support of its contention.

Plaintiff contends that the logical inference to be drawn from defendant giving its own check in payment of the premiums, is that it intended fulfillment of its promise. We have before us only the oral testimony of Rosenfield that both checks were given after it received the premium from Murray. Although the answer of defendant alleged the checks were given in accordance with its purpose stated above, it failed to produce at the trial either Murray or his bad check in support of its contention. It is not clear just why the defendant issued its own check rather than simply endorse the checks from Murray and forward them to the plaintiff in accordance with its plan only to pay premiums received from the insured. Certain inferences, i.e., that the bad check of Murray, if produced at the trial, would have proven unfavorable to the defendant, and that defendant's own checks were evidence of its acknowledgement of its personal obligation, could thereby be drawn.





This court also notes here the fact that there are certain inconsistencies in the testimony of Rosenfield regarding the time of cancellation of the policies and whether Murray's check "bounced" before or after they were cancelled. Cram and Rosenfield were the only witnesses at the trial. From the words of the trial judge that "It is a question of veracity and credibility. . . , "it may be concluded that the court gave greater credence to the testimony of Cram. As was stated in Jorn v. Tallett, 341 Ill. App. 240, 246, "The trial judge who sees and hears witnesses is in a much superior position to find the truth than the reviewing court who has before it only the printed page." (Also Hudson v. Hudson, 347 Ill. App. 432, 435.)

For the foregoing reasons we think the judgment is not against the manifest weight of the evidence, and the judgment is accordingly affirmed.

AFFIRMED.

KILEY, P. J. CONCURS.

MURPHY, J., TOOK NO PART.

Abstract only.



47251

WAHRER BROS. INC.,

Plaintiff - Appellee,

v.

MILTON WILLIAMS and NETTIE  
WILLIAMS,

Defendants - Appellants.

16 I.A.<sup>21</sup> 467

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff brought an action of trover against defendants, Nettie and Milton Williams. The cause was tried before a court without a jury. The action was dismissed as to defendant, Nettie Williams. Milton Williams was found guilty, and damages assessed in the sum of \$199.50.

No appearance or brief was filed in this court in behalf of plaintiff.

The statement of claim alleges in substance that defendants purchased certain watches and jewelry from plaintiff; that pursuant to an agreement, title to said merchandise was to be retained by plaintiff until purchase price was paid in full; that defendant had defaulted in payments; that the last demand was made on December 17, 1955; that defendant has refused to deliver said merchandise to plaintiff; and that defendant's refusal to deliver the merchandise was wilful and malicious and done with the express intent to deprive plaintiff of his merchandise. Issues were joined and the court found Milton Williams guilty of having converted to his own use, the property of plaintiff and assessed the damages in the sum of \$199.50.



Defendant admits that in 1950, without the knowledge and consent of plaintiff, he pawned the merchandise described in the conditional sales agreement and that he failed to redeem said merchandise from the pawn broker.

The record discloses that on March 15, 1954, a judgment by confession was entered in the Municipal Court of Chicago on the conditional sales contract in the sum of \$273.50.

Defendant contends that no damages were proven on the trial.

The law seems well established that in an action for conversion of merchandise, proof of current market value is necessary. Sparr v. Slakis, 180 Ill. App. 304, Robinson v. Alexander, 141 Ill. App. 192, and Sturgis v. Keith, 55 Ill. 451.

The ordinary measure of damages in an action of trover is the value of the property converted at the time and place of conversion. Thompson v. Pollack, 342 Ill. App. 73. It is the sum necessary to compensate the plaintiff for all actual losses sustained as a proximate result of defendant's wrong.

Since there is no brief filed by plaintiff, we only speculate as to his theory of the case. Is \$199.50 the balance due on the confession of judgment entered on March 15, 1954? If so, this does not meet the test of compensatory damages in an action of trover, because the measure of damages is the value of the property converted. Moreover,



-3-

the judgment of March 15, 1954 is final. Plaintiff cannot have another judgment for the same consideration on the same note. A careful examination fails to disclose any evidence tending to prove damages in the action of trover.

In the view we take of this case, we deem it unnecessary to consider the other points raised.

For the reasons given, the judgment is reversed.

REVERSED.

KILEY, P.J. CONCURS.

MURPHY, J. TOOK NO PART.

Abstract only.





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47086

ALEX STEFAN,

Plaintiff - Appellee,

v.

ELGIN, JOLIET AND EASTERN RAILWAY  
COMPANY, a corporation,

Defendant - Appellant.

A  
161.A. 2d 468  
APPEAL FROM THE

CIRCUIT COURT

OF COOK COUNTY.

MR. PRESIDING JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is the second appeal in this personal injury action. The first appeal was by the defendant railroad from a \$100,000 judgment on a verdict against it and a cross-appeal by plaintiff from a judgment for the individual defendants, the employees of the railroad, on a verdict in their favor. This court reversed the judgment against the railroad and reversed the judgments for the employees and remanded the cause with direction to grant a new trial as to all parties on the respondeat superior issues.

Plaintiff sought leave to appeal to the Supreme Court from the judgment of this court reversing as to the railroad. The railroad filed a motion to dismiss for lack of a final judgment. The motion was sustained and plaintiff's petition dismissed. The railroad thereafter sought leave to file an original mandamus proceeding in the Supreme Court for an order expunging the remanding order in the judgment of this court. The Supreme Court denied leave. The railroad then filed its motion here to strike the remanding order. The motion was denied.



Subsequently in the trial court the railroad moved to vacate the order reinstating the cause pursuant to our mandate. The motion was denied and in due course the case was tried. At the close of plaintiff's case, on motion of plaintiff and over objection of the railroad, the individual defendants were dismissed. The trial proceeded as to the railroad. The jury found the railroad guilty and assessed plaintiff's damages at \$85,600. Judgment was entered on the verdict and the railroad appealed to the Supreme Court which transferred the cause here.

The Supreme Court by transferring the cause eliminated the constitutional questions relied on by the railroad in its attempt to appeal directly to that court.

The substantial issues remaining for determination by this court are: whether this court had jurisdiction in the original appeal to remand the cause for a new trial as to the railroad in the absence of such a motion made by plaintiff and ruled upon in the trial court at the original trial; whether prejudicial error occurred in the trial court's refusal to strike count 1 of the amended complaint and in dismissing the individual defendants from the case; whether the trial court erred in denying the railroad's motions in the instant trial for judgment notwithstanding the verdict and for a new trial; whether the court erred in instructing the jury; and whether the verdict is against the manifest weight of the evidence.

The first contention must be viewed in the context of the record of the first trial. The plaintiff's complaint



alleged facts supporting a theory of direct liability against the railroad and a respondeat superior theory of joint and several liability against the railroad and its defendant-employees.

The verdict found the railroad guilty and the individual defendants not guilty. The railroad moved unsuccessfully for judgment notwithstanding and for a new trial. Plaintiff moved for a new trial as to the individual defendants. The motion was denied. The railroad in this court as an alternative prayer, asked for a reversal of the judgment against it and a remandment with directions to sustain "the motion of said defendant for a new trial." The plaintiff's alternative prayer here was for a reversal of the judgment against him and a remandment with directions to grant him a new trial as to the individual defendants.

The effect of the verdict was to find the railroad guilty as to the allegations of its direct liability and to find the individual defendants, and the railroad by implication, not guilty as to the respondeat superior allegations. The substance of the railroad's contention is that since the plaintiff's new trial motion was directed only against the individuals, the court's denial of the motion was limited to the individuals; and that there was no nisi prius ruling on any motion for new trial as to the railroad which would give this court jurisdiction to grant a new trial as to it under plaintiff's respondeat superior theory.



This contention the railroad claims is supported by plaintiff's cross-appeal limited to the individual defendants. It argues that plaintiff should have included the railroad in his motion for new trial, in his cross-appeal and in his prayer here for new trial, all as to the respondeat superior issues.

We are unable to find merit in this point. The railroad argues as if the issues under the respondeat superior theory constitute a separate cause of action upon which the plaintiff would be entitled to a separate verdict in addition to the verdict plaintiff already had on the direct negligence charge.

Plaintiff was not entitled to request two recoveries against the railroad, one on the direct issues and one on the respondeat superior issues. Third National Bank v. St. Charles Savings Bank, 149 S.W.495, 501. He could not ask for a new trial as to the railroad on the respondeat superior issues, having already the verdict against it on the direct charges, without setting aside the verdict in his favor. (See Hall v. Chicago & N. W. Ry. Co., 349 Ill. App. 175, 196.) Had a new trial been granted as to the respondeat superior issues only, without setting aside the verdict for plaintiff, and a general verdict returned in plaintiff's favor, the problem would arise as to which verdict a judgment be entered upon against the railroad. (See Neal v. Curtis & Co. Mfg. Co., 41 S.W.2d 543 for a discussion of this dilemma.) Had the verdict plaintiff obtained against the railroad been set aside in order to try the respondeat superior issue and a

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not guilty verdict result, the question would arise whether judgment should be entered against plaintiff despite the original verdict in his favor.

The railroad has cited no cases directly pertinent to its claim. In Goodrich v. Sprague, 376 Ill. 80, the Supreme Court held this court without jurisdiction to rule upon a motion for new trial not ruled upon at the trial. There, however, there was a verdict for plaintiff, judgment notwithstanding the verdict entered for defendant and no ruling on the alternative motion for new trial. This court reversed the judgment for defendant, passed on and denied the motion for new trial and entered judgment for plaintiff. The Supreme Court said at page 87, "the Appellate Court, in determining that plaintiff in error was not entitled to a new trial and in entering judgment on the verdict, was exercising original jurisdiction."

Had judgment been entered there on the verdict for plaintiff and this court reversed and remanded for new trial, the case would be useful. The Supreme Court did not say in the Goodrich case that a plaintiff having verdict and judgment in his favor must make, and have a ruling thereon, a motion for new trial in order to give this court jurisdiction to remand for a new trial after reversing the judgment.

Neither Goodrich v. Sprague, supra, Scott v. Freeport Motor Casualty Co., 379 Ill. 155, nor Walaite v. C., R. I. & P. Ry. Co., 376 Ill. 59, <sup>are</sup> authority for the railroad's argument that this court exercised original jurisdiction when it reversed the judgment in plaintiff's favor

The first of these is the fact that the  
 relationship between the two is not a simple one.  
 It is a complex one, and it is one that  
 has been the subject of much research.  
 The second is the fact that the relationship  
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 The eighth is the fact that the relationship  
 is not a simple one. It is a complex one,  
 and it is one that has been the subject  
 of much research. The ninth is the fact  
 that the relationship is not a simple one.  
 It is a complex one, and it is one that  
 has been the subject of much research.  
 The tenth is the fact that the relationship  
 is not a simple one. It is a complex one,  
 and it is one that has been the subject  
 of much research.

and remanded the case for a new trial. We think that an anomaly would be created by imposing on a plaintiff, who has judgment in his favor, the burden of moving for a new trial. We conclude that there was no exercise of original jurisdiction in our first decision.

Since we have concluded that plaintiff was not required to move for a new trial as to the railroad, having already a verdict against it, Hughes v. Bandy, 404 Ill. 74, pertaining to waiver of the right to new trial is not pertinent.

The instant trial was upon an amended complaint filed after the remandment by this court. Count 1 alleged negligence of the railroad arising from the failure of the flasher light signals at the crossing and from the defective condition of the crossing. Count 2 alleged the negligence of the railroad through its servants, Ferguson and Miller, in failing to give warning by bell or whistle; in operating the train at an excessive speed; in failing to stop the train upon a reasonable opportunity to observe plaintiff's car on the tracks and prevent the imminent collision; in failing to stop when they knew or should have known the car was stopped in the path of the train; and in failing to apply the brakes about 900 feet west of the crossing when they had an unobstructed view of plaintiff's car and when they could have stopped in the emergency within 300 feet.

The railroad moved to strike count 1 on the ground that the opinion of this court on the first appeal had removed from the case the theory charged in count 1. The



motion was denied. The motion to strike should have been allowed but the error was obviated when the count was stricken at the close of plaintiff's case and by an instruction informing the jury the count had been withdrawn. Also defendant's attorney had no objection to the reception of evidence of the failure of the flasher signals and the condition of the crossing in so far as it had a bearing on the question of contributory negligence.

The railroad claims prejudicial error in the trial court's dismissal of the individual defendants because plaintiff's motion did not comply with section 52 of the Civil Practice Act (Ill. Rev. Stat., Chap. 110, par. 52) governing Voluntary Dismissal. Part of that section states that after "trial or hearing begins" a plaintiff "may dismiss only on terms fixed by the court" upon stipulation or on motion supported by "affidavit or other proof" specifying the ground for dismissal. The affidavit filed with plaintiff's motion misconceived the remanding order of this court but that fact did not preclude an exercise of the trial court's discretion because plaintiff had a right of election, in the beginning and under our mandate, to sue the individuals or the railroad or both. No abuse of discretion has been shown and we find no prejudicial error in the ruling.

The contention is made that there was no proof of negligence on the part of the railroad. On this point we take only the evidence favorable to plaintiff and draw the legal inferences most strongly in his favor, rejecting contradictory and contrary evidence to decide whether there is

The first thing I noticed when I stepped out of the car was the cold. It was a sharp, biting cold that seemed to penetrate my coat. I shivered as I walked towards the building, my hands tucked into my pockets. The air was thick with the scent of old stone and the distant hum of city traffic. I had heard that the place was haunted, but I didn't believe it until now. The building was a grand, multi-story structure with ornate architectural details. The windows were dark, and the entrance was shrouded in shadow. I hesitated for a moment before pushing open the heavy wooden door. Inside, the atmosphere was even more eerie. The floor was made of polished wood, reflecting the light from the chandelier hanging from the ceiling. The walls were covered in tapestries of various sizes, depicting scenes from the past. I walked deeper into the room, my footsteps echoing on the floor. The air felt heavy, as if it was holding its breath. I noticed a small table in the corner, covered with a white cloth. On it sat a single, wilted flower. I picked it up, examining it closely. It was a simple, white daisy, but it felt like it had a life of its own. I placed it back on the table and continued my exploration. The more I walked, the more I felt like I was being watched. I turned around, but saw nothing. The silence was oppressive, and I began to feel a sense of unease. I wanted to leave, but I was drawn back to the room. I walked towards the end of the hallway, where a door stood slightly ajar. I pushed it open, and a bright light emanated from the room beyond. I stepped forward, my heart pounding. The room was large and open, with a high ceiling and a large fireplace. The fire was burning brightly, casting a warm glow over the room. I felt a sense of relief, but the feeling didn't last long. As I turned to leave, I saw a shadow on the wall. It was a dark, indistinct shape, but it seemed to be watching me. I froze in place, my breath caught in my throat. The shadow disappeared, and I was alone again. I walked back to the door, my hands trembling. I opened the door and stepped out into the cold night air. I looked back at the building one last time, feeling a mix of fear and fascination. I had discovered something, but I didn't know what it was. I walked away, my mind racing with thoughts of what I had seen and felt. The cold was still there, but it didn't feel so sharp anymore. It was a cold that had a purpose, a cold that was part of a larger plan. I knew that I had been chosen, and I knew that I was not alone.

any evidence of negligence. Hunter v. Troup, 315 Ill. 293; Mahan v. Richardson, 284 Ill. 493.

As plaintiff drove up to the crossing the flasher signals were not operating. He drove on to the tracks slowly because of the "very bumpy" condition of the crossing planks. A front wheel of his car "hit those boards"; the car "shook and the engine died." He looked west, where he could see "around nine hundred feet," but saw no train; he looked east and saw no train; and he then stepped on the starter but the engine did not start. He again looked west, saw the train about 900 feet away with no obstruction between it and him and tried again unsuccessfully to start the car. When he looked west the third time, the train was about 700 feet away. He gave a signal to the train that "I am stuck on the track" and saw someone in the locomotive cab wave "the way" he had waved at "them." When the train was 300 feet away, it appeared to be slowing down; and because of the wave from the train, he tried unsuccessfully the third time to start the car. He then looked to the west again to see whether the train "stopped or was still going" and saw it was only 30 or 40 feet away so he opened the door to get out of the car. That is "as far" as he remembers.

The train, operated at 25 miles per hour by the fireman, acting as engineer, on straight track for 800 or 900 feet with two brakemen in the cab as well as the engineer - across from the acting engineer -, without sounding a warning, struck plaintiff's car. After the collision the locomotive





travelled more than 230 feet past the intersection. The acting engineer had no idea how many feet the train would move before stopping after the brakes were applied at 25 miles per hour. The engineer, however, testified that at 15 miles per hour, the speed estimated by the trainmen, the train could have been stopped consistently with safety to passengers in about 300 feet.

It is our opinion that there is evidence from which the jury could reasonably infer that the trainmen could have seen plaintiff's predicament in ample time to stop the train before the collision or could have warned him in sufficient time to enable him to get out of his car, and that nevertheless the trainmen, though waving to him that they knew his peril did not stop the train or warn him to protect himself and collided with the car.

The parties agree that Indiana law governs the substantive rights of the parties. Jensen v. Baltimore & O. R. Co., 330 Ill. App. 134.

The railroad argues, without merit, that the testimony of Stefan and Dulinski that they heard no whistle is insufficient in either Indiana or Illinois to raise an issue of fact on the question of negligence in failing to sound warning. The rule in Hummel v. New York Central R. Co., 66 N.E. 2d 901, 902, is that "...testimony of one who was near a crossing and in a situation to have heard the whistle, that he did not hear it, is generally sufficient..." to raise the fact question. There the witness said the train "could have whistled." And in Illinois "it is well settled that



negative evidence is admissible where the attending circumstances are such as to show it has some probative force." Berg v. New York Central R. Co., 391 Ill. 52, 60. The cases of Wabash R. Co. v. McNown, 99 N.E.126, and Baltimore & O. S. W. R. Co. v. Abegglen, 84 N. E. 566, do not preclude a finding that the failure to sound warnings was the proximate cause of the accident. Neither case involved a "stalled-car."

The claim is made by the railroad that under Indiana law unless plaintiff can recover under the last clear chance doctrine he had no cause of action since it is only under that theory that "stalled-car" cases are upheld in that state. We think Engle v. Cleveland, C., C. & St. L. Ry. Co., 149 N. E. 643, 645, shows the contrary. The last clear chance doctrine "means simply that where the negligence of the defendant is the proximate cause of the injury for which suit is brought, and that of the plaintiff only the remote cause, the plaintiff may recover. . . . It is a negligent failure to avoid a discovered peril." Southern Ry. Co. v. Ingle, 69 N.E.2d 746, 748. The jury in the instant case decided plaintiff was not negligent; the doctrine, accordingly, does not apply. And the cases cited under that doctrine are inapplicable. We are of the opinion that plaintiff was not limited to the last clear chance theory and conclude that the question whether the railroad was negligent and whether its negligence was the proximate cause of plaintiff's injuries were for the jury.



We think also that under Indiana law the question of plaintiff's due care was for the jury. The case of Pennsylvania R. Co. v. Stilabower, 39 N.E. 2d 465, is a "stalled-car" case. The Indiana Appellate Court applying the familiar rule on the propriety of rulings on motions for directed verdict decided that the question of due care was for the jury. The plaintiff there, while trying to start his truck, did not see the locomotive until it was 150 feet away and is therefore different from the facts in the instant case. We are bound by the Indiana law on this question but this is not to say we must assume that the Indiana court would decide on the facts in the instant case that the question was not for the jury.

In Hedgecock v. Orlosky, 44 N.E.2d 93, wherein defendant negligently caused plaintiff's car to become interlocked with hers in the middle of an intersection, the Indiana Supreme Court stated at page 95 that a person can reasonably be expected to make a prudent effort to save his property which has been placed in peril by the negligence of another. There the court held plaintiff was guilty of contributory negligence but indicated that had plaintiff ". . . flagged the traffic until the place was made reasonably safe before undertaking to move his automobile" such action might have satisfied the requirements of due care. In the instant case plaintiff's wave and the return wave, we think, is somewhat analogous and is enough to take the question of due care to the jury. Janjanin v. Indiana Harbor Belt R. Co., 343 Ill. App. 491, and I.C. R. R. Co. v. Siler, 292 Ill. 390, 393, though Illinois cases, help support our conclusion.



The inference from plaintiff's testimony that the crew recognized his peril and led him to expect their protection and began to slow down distinguishes Truett v. Atlantic Coast Line R. Co., 33 S.E.2d 396, where the court thought appellant's reckless conduct "gross negligence"; Horsley v. Chesapeake & O. Ry. Co., 61 S.E. 2d 868, where the driver "recklessly" elected to "stake his safety" on starting the motor; and the other cases, cited by defendant, from foreign jurisdictions. We cannot say that the jury, if it believed plaintiff's testimony, should not have decided plaintiff had "good reason" to conduct himself as he did, having in mind that the question was plaintiff's conduct measured by that of an ordinary prudent man in a like situation. Gamble v. Lewis, 85 N.E. 2d 629.

This is not a case where plaintiff merely presumed the train would stop as in the rule stated in Soule v. Chicago & N. W. Ry. Co., (C.A. 7), 175 F2d 424, quoting Moudy v. N.Y. C. R. R. Co., 385 Ill. 446. Here plaintiff saw the wave from the train and the train began slowing down. In Turner v. Atlantic Coast Line Ry. Co., (C.A. 5), 222 F. 2d 337, the court found the plaintiff negligent in failing to look for the train, failing to see it when his car was stalled and in attempting to start his car while stalled after being warned twice of the imminent danger. The case of Chesapeake & O. Ry. Co. v. Williams, 51 N.E.2d 384, does not apply. There the court found plaintiff did not look for an approaching train until a few seconds before

The first thing I noticed when I stepped out of the car was the cold, crisp air. It felt like a fresh blanket after a long, hot summer. I took a deep breath, savoring the scent of pine and the distant sound of water. The landscape was breathtaking, a vast expanse of green fields stretching towards a range of jagged mountains under a clear blue sky. A small stream flowed gently through the center of the valley, its surface reflecting the sunlight in shimmering patterns. I walked along the path, my feet crunching on the dry leaves. The silence was profound, broken only by the occasional chirp of a bird or the rustle of a squirrel. As I continued, I noticed a small wooden cabin nestled among the trees, its roof covered in a thick layer of snow. The scene was idyllic, a perfect escape from the hustle and bustle of city life. I felt a sense of peace and tranquility that I had never experienced before. The beauty of the place was overwhelming, and I knew that this would be a special memory for a long time to come. I stood still for a moment, taking in the view, feeling the warmth of the sun on my face. The world seemed so small and so full of wonder. I smiled, knowing that I had found exactly what I needed. The journey was over, but the memories would last forever.



he was hit. New York Central Ry. Co. v. Powell, 47 N.E.2d 615, cited by defendant, decides that speed of itself is never negligence, in the absence of a speed limit, and must be coupled with failure to give warning.

The railroad complains of instruction number 12 telling the jury "...when a tort or wrong is committed by employees or servants of the railroad in the course of their employment and while pursuing the railroad's business, the railroad will be liable for damages, if any, proximately resulting from such tort or wrongful act." The instruction was approved in substance in Reilly v. Peterson Furniture Co., 314 Ill. App. 46, 52. It is an abstract instruction but so were several given at defendant's request. We see no error in this instance.

Two juries refused to believe the version of the railroad's employees that the locomotive was but 150 feet from the intersection when plaintiff's car stalled. We cannot say the jury should not have accepted plaintiff's version. That version does not involve physical impossibilities nor contain inherent improbability. The jury could have decided that the trainmen saw or should have seen plaintiff when there was ample time to stop the train and that they indicated they would stop. The jury could have thought it significant that if the train was going but 15 miles per hour and could be stopped in 300 feet why the train went more than 230 feet beyond the intersection. The acting engineer had no idea of the distance in which the emergency brakes might stop the train. This sample of probable



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considerations indicates reasons why we think the jury could find the railroad negligent. We conclude that there is no merit to the contention that the verdict is against the manifest weight of evidence.

We find no error in the trial court's refusal to grant the railroad a new trial.

We have considered all the points raised. The judgment is affirmed.

AFFIRMED.

LEWE AND MURPHY, JJ., CONCUR.

ABSTRACT ONLY.



## STATE OF ILLINOIS

APPELLATE COURT

February Term, A. D. 1958.

THIRD DISTRICT

161A<sup>2d</sup> 469

Agenda No. 1

General No. 10115

W. W. Bryant, as Administrator of the Estate  
of Gary D. Bryant, deceased,

Plaintiff-Appellant  
and Cross-Appellee,

vs.

The New York Central Railroad Company,

Defendant-Appellee  
and Cross-Appellant.

# # #

The New York Central Railroad Company,

Cross-Plaintiff  
and Cross-Appellant,

vs.

W. W. Bryant, as Administrator of the Estate  
of Gary D. Bryant, deceased; Wendell W. Bryant,  
also known as W. W. Bryant; Frank Prah and  
Howell Asphalt Company,

Cross-Defendants  
and Cross-Appellees.

Appeal from the  
Circuit Court of  
Coles County

Roeth, J.

Plaintiff commenced a suit for the alleged wrongful death  
of his intestate resulting from a collision between a passenger  
train of the defendant railroad and a truck operated by Gary D.  
Bryant. The defendant answered and filed a counterclaim for damages  
to its equipment, resulting from a derailment of several of its  
passenger cars. To the counterclaim the railroad company made

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The following information was obtained from the records of the Bureau of the Census, Department of Commerce, for the year 1958:

1. The total population of the United States was 167,000,000.

2. The total population of the United States was 167,000,000.

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10. The total population of the United States was 167,000,000.

additional parties defendant Wendell W. Bryant individually, Frank Prah1 and Howell Asphalt Company, alleging in various counts that the deceased was the agent and servant of one or more of the additional parties. A jury returned a verdict for \$20,000.00 against the railroad company and separate verdicts finding each of the counter-defendants not guilty as to the counterclaim. Special interrogatories as to whether the deceased was an employee of Howell Asphalt Company or Frank Prah1 were answered in the negative. The defendant railroad company then filed a lengthy post trial motion praying in substance that judgment be entered for the railroad company, notwithstanding the verdict on the complaint, or in the alternative that a new trial be granted to it; that the answers to the special interrogatories be set aside and that judgment be entered for the railroad company on its counterclaim, notwithstanding the verdict, or in the alternative that a new trial be granted on the counterclaim. The trial judge granted the motion of the defendant railroad company to enter judgment in its favor, notwithstanding the verdict as to the complaint, and denied all other portions of the post trial motion. This case is before this court on appeal by the plaintiff from the judgment entered, notwithstanding the verdict, and on cross appeal by the railroad company from that part of the judgment order which denied the above noted portions of its post trial motion.

So far as plaintiff's appeal is concerned the determinative question before us is whether there is any evidence in the record which, standing alone and taken with all its intendments most

Additional notes submitted by the appellant.

It is noted that the appellant has not submitted any evidence in support of his claim for a new trial.

The appellant has also submitted a motion for a new trial, but has not submitted any evidence in support of his claim.

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favorable to the plaintiff, tends to prove the essential elements of the case-- in the case at bar, the element of negligence on the part of the railroad company and the element of due care on the part of the deceased.

In considering the element of negligence of the railroad company it is important to refer to the allegations of the complaint. The charges of negligence contained in the complaint are:

"(a) The Defendant so negligently and carelessly and improperly operated the passenger train that as a direct and proximate result, the Train collided with the motor vehicle, which the Plaintiff's Intestate was operating.

"(b) The Defendant negligently and carelessly violated the provisions of Illinois Revised Statutes 1953, Chapter 114, Section 59, in that no bell of at least thirty (30) pounds weight or steam whistle placed on a locomotive was rung or whistled by the engineer or fireman at a distance of at least eighty (80) rods from the crossing, or that kept ringing or whistling until the crossing was reached by the locomotive.

"(c) The Defendant negligently and carelessly instructed and maintained the crossing and the approaches thereto within their respective right-of-way, so that the same was unsafe as to persons and property using the said highway, contrary to the provisions of Section 62, Chapter 114, of the Illinois Revised Statutes 1953.

"(d) The Defendant by the exercise of ordinary care, knew or should have known, that the conditions as they existed created a dangerous crossing for persons using the said highway."

To determine whether there is any evidence supporting one or more of these charges we are required to scrutinize the evidence.

This accident occurred at what is known as the Monroe Crossing on the Lerna Road, a country road outside of the City of

Favorable to the [redacted] leads [redacted]  
of the case-- in the [redacted] [redacted]  
part of the railroad company and the [redacted] [redacted]

[redacted]

1. The following information is being furnished to you for your information only. It is not intended to be used for any other purpose. It is not to be distributed outside your organization. It is not to be used for any other purpose. It is not to be distributed outside your organization. It is not to be used for any other purpose. It is not to be distributed outside your organization.

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1. The Commission has received information from the  
2. Department of the Interior that the Bureau of Land  
3. Management is currently conducting a study of the  
4. potential for oil and gas development in the  
5. area of the proposed project. The study is being  
6. conducted in accordance with the requirements of the  
7. National Environmental Policy Act (NEPA). The study  
8. will consider the potential impacts of oil and gas  
9. development on the environment, including the  
10. effects on wildlife, fish, and vegetation. The  
11. study will also consider the potential impacts of  
12. oil and gas development on the local economy and  
13. the community. The study will be completed by  
14. the end of the year. The results of the study  
15. will be used to inform the decision-making process  
16. regarding the proposed project. The Commission  
17. will continue to monitor the progress of the study  
18. and will provide updates as they become available.

(d) The Government of the Republic of Colombia, known as should have been, that its officials are they related or under a false name crossing for persons using the said passport.

To determine whether there is any evidence exculpatory and in favor of these charges we are required to scrutinize the evidence.

This accident occurred at what is known as the Monroe Crossing on the Laramie Road, a country road outside of the City of

Mattoon. The Lerna Road extends north and south and the railroad, a single track, extends east and west. Route 16 is a hard surfaced state highway connecting the City of Charleston and the City of Mattoon. At a point 587 feet north of where the collision occurred, Route 16 makes a sweeping curve to the southwest and at the start of the curve, the Lerna Road commences and runs south as what would be a continuation of Route 16 if that highway continued in a north and south direction. There is in evidence a plat drawn to scale by a civil engineer, showing the commencement of the Lerna Road, the curve of Route 16, the Monroe Crossing and the territory in the vicinity thereof, together with physical objects in that territory. Measurements were made of various things and distances shown on the plat and these measurements are likewise shown. This plat was stipulated in evidence by counsel for all parties and accordingly is to be taken as accurate. Some of the oral testimony indicates that some of the witnesses made estimates of certain distances shown on the plat, at variance with the actual measurements. A careful examination of this testimony reveals that in no instance had the witness made any measurement and that in each instance the estimate was merely a guess or expression of opinion based upon casual observation. The plat shows that proceeding south from Route 16 on the Lerna Road a distance of 394.7 feet, the Lerna Road is intersected at a T intersection by a road from the west. This road with the Lerna Road and the curve of Route 16 form a triangular plot of land on the west side of the Lerna Road which is a highway park. There

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are ten trees of varying size scattered throughout this park area. The tree closest to the Lerna Road is 27 feet to the west of the west right of way line. This tree is 345 feet north of the north rail of the railroad. The tree in this park farthest from the Lerna Road is over 200 feet to the west. South of this triangular park and between the east and west road intersecting the Lerna Road at a T, and the right of way line of the railroad there is a rectangular plot of ground which is fenced and in which a pond has been created by excavation and piling of the dirt in an oval shape. This pond and the excavation furnishes no obstruction to the view of the railroad tracks. The north right of way line of the railroad is 47.6 feet from the north rail and is fenced. Beyond the fence line of the railroad right of way and within the rectangular plot of ground and adjacent to the pond there is a row of six willow trees. These trees are from 5.4 feet to 7.4 feet from the right of way fence. The willow tree closest to the Lerna Road is 68.5 feet to the west of it and then the trees are more or less evenly spaced from 20 to 23 feet apart. On the day of the accident the trees were leafed out and portions of the branches overhung the right of way approximately 4 or 5 feet. The trunks of these six trees are from 53 to 55 feet north of the north rail of the railroad tracks and the trees are from 25 to 30 feet high.

To the west of the six willow trees there is a row of seven houses extending west along the right of way of the railroad. The distances between these houses vary from 67 feet to 185 feet.



The house closest to the Lerna Road is 403 feet to the west and this house is 111 feet north of the north rail of the railroad. Adjacent to this house and to the east of it, there are several fruit trees and poplar trees. To the east of the Monroe Crossing the country is open country.

The crossing is protected by two signs as one drives south. The first is the conventional circular metal highway disc located 143.6 feet from the north rail and the second a conventional E. E. crossbuck located 15.5 feet from the north rail. There are no flashers or wigwag signs. Nor are there any gates or a watchman. Travelling south on the Lerna Road where it commences off of Route 16, there is no appreciable grade for the first 300 feet. At a point 250 feet north of the north rail the Lerna Road proceeds upgrade to the crossing and reaches a maximum grade of 4%. The rails of the railroad are 4 or 5 feet above the ground level of the other land in this vicinity.

On the day in question the deceased was engaged in hauling crushed stone from a quarry north of the Monroe Crossing. He had made 4 or 5 round trips on the same day prior to the occurrence and had crossed this crossing in question on those occasions. He had been working on this same hauling job for 8 or 10 days previously. He was driving an International dump truck loaded with 8 tons of crushed stone. The truck had been serviced shortly before the accident. The speedometer was in good working order, the windshield

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was clear and in good shape, the hydraulic brakes were in good order and the overall mechanical condition of the truck was good. The weather was clear, visibility was good and the pavement was dry. The accident happened shortly before noon.

Leaving the quarry the deceased came onto Route 16 and headed in a southerly direction until he reached the point where the Lerna Road commences and Route 16 curves to the southwest. Two passenger cars were behind him. The first car was following 75 to 150 feet behind and contained three men, all of whom testified for the defendant railroad. The second car contained only the driver and he testified for the plaintiff. As the deceased approached the commencement of the Lerna Road he extended his arm to indicate an intention to proceed south on the Lerna Road instead of around the curve. Proceeding down the Lerna Road the speed of the truck was estimated at 30 to 40 miles per hour-- one witness estimating it at 30 to 35 miles per hour, one at 35 miles per hour and two at 35 to 40 miles per hour. As the truck proceeded down the Lerna Road, the two cars following, continued around the curve of Route 16. When the truck was within 15 to 20 feet of the track it made a sudden turn to the left and continued down a ledge alongside the north rail and the train and the truck came in contact at a point somewhere between 25 and 40 feet east of the Monroe Crossing. The truck was thrown to the north and overturned. A number of the cars of the train were derailed and overturned like jackstraws on a table top.



The train in question was a 10 car and 2 diesel unit streamliner passenger train. It had been inspected at Mattoon which is located about 3 miles from the Monroe Crossing. As the train left Mattoon the engineer checked his brakes and found them to be in good working order. The automatic bell ringing device was turned on and the bell began to ring. The bell continued to ring from the time the train left Mattoon until after the accident when it was turned off by the engineer. The train was equipped with two whistling horns located on top of the front end of the front diesel unit. These horns are side by side and one points to the rear and the other to the front. These horns are operated by whistle cords under control of the engineer. The record shows the reason for the presence of two horns and the reason for one of the horns being faced forward and the other being faced backward, i.e., that in snow storms the forward facing horn clogs with snow and will not operate. The whistles are duplicates and either can be used and there is no difference in the intensity of sound between them, the one making as much noise as the other. On the day in question, when the train left Mattoon the forward facing whistle horn was not working and the engineer used the backward facing horn which was working in a normal manner.

As the train approached the Monroe Crossing it was traveling at 69 miles per hour. The engineer commenced whistling the crossing at a whistling post located 1663 feet west of the Monroe Crossing, by alternately blowing two longs and two shorts and con-

The first thing I noticed when I stepped out of the car

was a cold breeze. I had been told that the weather would be

just what I needed. The sun was shining brightly, and the

birds were singing. I felt a sense of peace and tranquility.

In the distance, I saw a small town nestled in a valley.

It was a beautiful sight, and I knew I had found a special

place. I had heard that the town was famous for its

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tinued so to do, over the crossing. As the train approached the crossing the engineer saw the truck of the deceased on the Lerna Road. It was then about 250 feet from the crossing and the train was between 500 and 600 feet from the Lerna Road. The engineer did not again watch the truck but continued to whistle and watch a control signal ahead. Suddenly a Mr. Manning, riding in the cab on company orders, called his attention to the truck with the words, "I don't think he's going to stop", whereupon the engineer let go of the whistle cord, shut off the engines and applied the brakes. The impact occurred at about the same time.

Plaintiff proved without objection that the deceased was in excellent health, industrious, a family man, frugal and sober at the time of his death.

Most of plaintiff's evidence is given to showing the location of the six willow trees, the intensity of the foliage and the location of the seven houses in the vicinity, obviously designed to demonstrate that this is an obstructed crossing. There can be no question that at varying points on the Lerna Road these physical objects furnish some obstruction to the view of an approaching train. However, a number of photographs were admitted in evidence. These photos were taken from the center of the Lerna Road at varying points from 120 feet to 325 feet north of the crossing. There are also several composite views. In each photo where the willow trees are shown, the rails of the railroad track are clearly visible in spite of the trees. There is testimony with respect to sight views made with a man on the railroad track. While inferences of

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obstruction might well be drawn from these sight views, it would tax the minds of reasonable men to say that a man on the track is comparable to a 12 unit passenger train. The ultimate question, of course, is the extent of the obstruction and as to this there is a conflict of testimony. To attempt to resolve this question would require a weighing of the testimony which we cannot do in considering the questions before us on this appeal. In passing, we cannot help but again observe that the engineer, one of plaintiff's witnesses and for whose testimony plaintiff must be held to vouch, saw the truck when it was 250 feet from the crossing. The train was then 500 to 600 feet from the Lerna Road. No reason is suggested by counsel for the plaintiff why, at these points, the same opportunity was not available to the deceased.

The question of obstructions at a railroad crossing is ordinarily referable to the issue of due care. Thus, there may be obstructions to view or distractions that might mislead a traveller over railroad tracks without his fault, or excuse a failure to look and listen. Tucker v. New York, Chicago and St. Louis Railroad Company, 111. 2d , N.E. 2d ; Karloek, Administrator etc. v. New York Central Railroad Company, 333 Ill. App. 655, 78 N.E. 2d 122. If only the question of due care of the deceased were involved in this case we would be compelled to hold the facts, such as the deceased signalling his entry onto the Lerna Road, the abrupt turning of the truck by the deceased before entering on the tracks, proof that deceased was healthy, strong,





sober, industrious and a family man, the presumption in favor of the human instinct of self preservation and avoidance of danger were sufficient to make the question of due care a fact question for determination by the jury.

There is, however, for additional consideration the question of negligence of the defendant railroad company. This question is not discussed in plaintiff's brief and is only briefly mentioned in his reply brief. Due care on the part of the deceased is a separate and distinct question from the claim of negligence on the part of the defendant railroad and before plaintiff is entitled to recover he must not only prove due care on the part of his intestate but must also prove the negligence alleged in his complaint and that such negligence was the proximate cause of plaintiff's death.

The complaint first alleges that defendant so negligently operated its train that as a direct result the train collided with the motor vehicle of the deceased. Since the defendant's alleged negligence must be made referable, if at all, to some more specific cause or defect or omission, this general allegation of negligence and any proof, if any, related thereto, must be considered in connection with the more specific charges.

The complaint then alleges that no bell was rung and no whistle was blown for a distance of at least 80 rods from the crossing or kept ringing and blowing until the crossing was reached. There is absolutely no proof in this record to sustain this charge. There

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is absolutely no proof in this respect to support this claim. Here

is no evidence in the record from which the proof of this charge might be inferred. The uncontradicted testimony is to the contrary. Plaintiff's own witness, the engineer, testified that the bell was ringing and the whistle was blowing from the whistle post, 1663 feet from the crossing, until after the train had passed over the Lerna Road. Plaintiff's witness David, who claims to have witnessed the accident, was asked no questions, as reflected by the abstract, touching upon the ringing of a bell or the blowing of a whistle. Defendant's witnesses Martin, Hood, Farris and Hilsabeck, all of whom claimed to have witnessed the accident, testified to hearing the whistle being blown. Under these circumstances there was a total failure to prove this charge.

The next charge is that the defendant negligently constructed and maintained the crossing and approaches thereto contrary to the provisions of Section 62, Chapter 114 of the Illinois Revised Statutes 1953. We have searched the record for any evidence to support this charge. Nowhere is there any intimation of anything that would constitute a violation of the section of the statute referred to. No defects in the crossing or approaches are shown. The only evidence in the record is to the effect that the crossing was smooth, that the approaches come to the crossing at grade and are level with the crossing. Examination of the photographs disclose no defects in the approach or the crossing itself.

The final charge is that the defendant knew or should have known that the conditions as they existed created a dangerous

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crossing. These allegations do not charge any breach of duty, nor do they constitute an allegation of fact from which it can be determined whether the crossing is extra hazardous. Willett v. The Baltimore and Ohio Southwestern Railroad Company, 284 Ill. App. 307, 1 N. E. 2d 748. No statute required a watchman, gates, signal bells or other special warning and protective devices. The complaint does not allege that the Ierna Road was heavily travelled and that the crossing in question is, by reason of certain conditions, extra hazardous. Needless to say, the plaintiff can recover, if at all, only on a case pleaded and proved. We recognize that there are cases in which the courts of this state have held that extra hazardous conditions at railroad crossings require more than compliance with statutory requirements as to warning of danger. Such is the holding of Karlock, Administrator etc. v. New York Central Railroad Company, supra; Opp v. Pryor, 294 Ill. 538, 128 N. E. 580; McMullen v. The Illinois Central Railroad Company, 234 Ill. App. 416; Wagner v. The Toledo, Peoria and Western Railroad, 352 Ill. 85, 185 N.E. 236. In cases such as these, the complaint affirmatively alleged a much travelled highway or street and conditions surrounding the tracks which make the crossing extra hazardous and the proof sustained these allegations. The Karlock, Administrator etc. v. New York Central Railroad Company case, supra, is typical. There the complaint alleged and the proof showed that the street was a main thoroughfare in the City of Kankakee; that many cars, some 1300, daily passed over the crossing; that the crossing by reason of buildings, etc., adjacent thereto was extra hazardous;



that numerous persons had lost their lives at the crossing; that the City of Kankakee had petitioned the Commerce Commission to require the railroad to maintain a watchman at the crossing and facts of a kindred nature. Similar allegations are lacking in the complaint in the case at bar and there is no evidence that would support such allegations had they been made.

Plaintiff suggests that the fact that one of the horns on the diesel locomotive was not working is, in and of itself, proof of negligence and raises a fact question. This position is not tenable. The statute requires a locomotive engine to be equipped with a single bell and a single whistle which shall be rung and whistled for a certain distance before reaching the public highway. Here instead of a single horn the engine was equipped with two horns. One admittedly was operable and under the undisputed testimony was operated. Not only was it operated, but it was heard by all witnesses who were questioned on the subject.

From the foregoing we conclude that there is a total failure to prove negligence as alleged, on the part of the defendant railroad. The judgment of the trial court in entering judgment notwithstanding the verdict was therefore correct.

From the foregoing review of the record in this case it is apparent that that part of defendant's post trial motion praying for judgment on its counterclaim notwithstanding the verdict was properly denied by the trial court. There accordingly was no error in so doing.

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Defendant on its cross appeal also contends that the verdict of the jury finding the counterdefendants to the counterclaim not guilty is against the manifest weight of the evidence. To sustain its counterclaim defendant was required to prove negligence on the part of the deceased. From the record before us, this was a fact question for the jury. Where evidence is conflicting, it is for the jury to weigh the evidence and determine the credibility of the witnesses, and a verdict based upon conflicting evidence approved by the trial judge should not be disturbed on appeal unless contrary to the manifest weight of the evidence. To be contrary to the manifest weight of the evidence an opposite conclusion must be clearly evident. DeLong v. Whitehead, 11 Ill. App. 2d 330, 137 N.E. 2d 276; Green v. Keenan, 10 Ill. App. 2d 53, 124 N.E. 2d 115; Griggs v. Clauson, 6 Ill. App. 2d 412, 128 N.E. 2d 363. Such, in our opinion, is not the situation in the case at bar.

Our conclusions on the foregoing questions before us make it unnecessary for us to consider the question of agency between the deceased and the counter-defendants Frahl, W. W. Bryant and Howell Asphalt Company.

Accordingly the judgment of the Circuit Court of Coles County will be affirmed.

Affirmed.

Carroll, P.J., and Reynolds, J., concur.

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HAROLD GREEN, et al.,

Plaintiffs - Appellants,

v.

CITY OF CHICAGO, a municipal  
corporation,

Defendant - Appellee.

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161.A.<sup>2d</sup> 539

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

MR. JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiffs appeal from a judgment entered for defendant on its motion to dismiss in an action for discovery and an accounting of funds. Plaintiffs elected not to plead over, and the complaint was dismissed.

Plaintiffs allege that they bring this action on behalf of themselves and all other similarly situated owners of special assessment bonds and vouchers, whose bonds and vouchers are delinquent.

Attached to the complaint is a special assessment voucher, the pertinent parts of which read:

"Office of Board of Local Improvements  
Installment Plan  
Water Pipe Extension

"The City of Chicago will pay from the Third installment of the Special Assessment Warrant above mentioned, on December 31st, 1933, or when and as said installment is collected and in the City Treasury, but from no other assessment or fund, to M. J. Behan, or order, the sum of Five Thousand Five hundred and no/100 Dollars, with interest thereon at the rate of five per cent per annum from date hereof, payable annually or when and as thereafter collected and in the City Treasury. This voucher is given under the provisions of that certain act of the General Assembly of the State of Illinois, entitled "An Act Concerning Local Improvements," approved June 14, 1897, and in force July 1, 1897 (and the amendments thereto) and is issued in



part payment for work, labor and material, done, performed and furnished, in accordance with a certain contract with the City of Chicago, for Water Supply Pipe in Parnell Ave. from 127th St. to 129th Pl. \* \* \*

"By accepting this voucher the holder thereof expressly agrees that the City of Chicago shall and does have the right to pay the whole or part thereof at any time after date hereof. The agreement of the contractor accepting this voucher, as hereafter appearing, is hereby made a part of this voucher."

"In consideration of the issuing of this Voucher for sel, heirs, executors, administrators and assigns, accept the same in full payment of the amount herein stated, and relinquish any and all claims or liens may have against the City of Chicago for the work mentioned herein, or for the payment of this Voucher, except from the collection of the Special Assessment Warrant herein named.

M. J. Bohan

Contractor"

The complaint alleges that in most instances, the liens, of the respective special assessments against certain parcels of realty have been foreclosed in proceedings brought or acquiesced in by said defendant pursuant to an agreement with the persons owing assessments, and that under the terms of said agreements, less than the total amount due was to be paid at the sale held under and pursuant to the decree of foreclosure; that liens which stood as security for these vouchers have been lost through these foreclosure proceedings; that defendant has placed in a special fund, entitled the "Water Fund", all monies received for supplying water to its consumers and that there exists in this fund a net surplus to repay the cost of laying all water main extensions



initially financed through special assessment ; that an ordinance in existence at the time of the issuance of the vouchers here involved, provided for the repayment to the owners of private property assessed for water main extensions, 90% of assessments paid by property owners at such time as the water main extension returned to defendant a permanent annual rate in excess of 25 cents per lineal foot; and that the savings realized by defendant in ending its obligation to repay 90% of the assessment constituted a profit to defendant of the amounts thus saved at the expense of owners and holders of special assessment bonds and vouchers, contrary to the duties and obligations of defendant as trustee.

The defendant's theory is that since the vouchers on which plaintiffs' claim is based provided that the holders thereof may look for payment only to the specific special assessment fund into which the special assessment collections pertaining to said vouchers are payable, and to no other fund whatsoever, defendant as trustee of said warrant fund is bound to use only the money in said warrant fund for the payment of plaintiffs' vouchers.

Plaintiffs contend that the statutes and ordinances of Chicago require that the cost of water main extensions be paid out of the water fund.

The statute relating to the making of an improvement in force at the time the contract in controversy was made is found in Sections 73 and 90 of the Local Improvement Act of June 14, 1897 as amended (Ill. Rev. Stats. 1931, Chap. 24, paras. 201 and 222). In substance, Section 73 provides





that no person taking any contract from the City and agreeing to be paid out of special assessments, shall have any claim or lien upon the City, except from the collection of special assessments made for the contract work. Section 90 provides that no person accepting the voucher or bonds as provided herein shall have any claim or lien upon the City for the payment of such vouchers or bonds, or the interest thereon, except from the collection of the assessment against which said voucher or bonds are issued, but the municipality shall not be in any way liable to the holders of said vouchers or bonds in case of failure to collect the same.

From a reading of the foregoing statutes, it is clear that the contractor, voucher holder or bond holder can have no claim against the City, except from the money collected from the particular special assessment. Moreover, the contractor, voucher holders or bond holders are bound by the language of the contract. As was said in Village of Park Ridge v. Robinson, 198 Ill. 571, 585:

"True, as pointed out, the act of 1875 makes no express provision for limiting the liability of the corporation to payment out of the special fund, as made by section 49 of article 9, and by section 74 of the act concerning local improvements; but whether either of these provisions is applicable to the contract in question or not, we have no doubt that the corporation has the corporate power to limit its liability, by contract, to pay only out of the fund which the statute authorizes it to raise for such payment. Such a power, whether expressly given or not, is necessary to other powers expressly granted, and will be implied."



To the same effect, see Donahue v. Village of LaGrange, 263 Ill. 607. And in the leading case of Rothschild v. Village of Calumet Park, 350 Ill. 330, 338-39, the court said:

"We have held that the proceeds of special assessments are trust funds for the payment of the bonds issued for the cost of improvement. (Conway v. City of Chicago, 237 Ill. 128.) The theory of the statute is, that the bonds issued against each installment of the assessment together with the interest on them, will be paid as the installment and the interest on it are collected. The installments are payable on January 2 of each year and the bonds will be due at a later date in the same year. The installments are the only source of payment of the bonds, and when they are collected by the municipality the money received becomes a trust fund for the payment of the bonds to the holders, without preference among them. If for any reason the full collection of an installment is not made the deficiency must fall upon the bondholders, and equity requires that the loss shall be borne ratably by each bondholder. Therefore, when the bonds of any year become due and the collection from the installment of that year is insufficient to pay them, the bondholders are entitled to the amount collected, and it is the duty of the trustee--the municipality--to pay upon each bond issued against the installment its share, pro rata, of that amount."

In Bransfield and Sons, Inc. v. City of Chicago, 342 Ill. App. 206, plaintiff was the owner of special assessment bonds, on which payments were made. Plaintiff demanded payment of its unpaid bonds from moneys collected by the City of Chicago from a fund consisting of penalties and interest collected from property owners, who were late in paying their special assessments. Upon appeal, this court, in reversing the trial court, held that the plaintiff was not entitled to preferential payment out of money in the penalties and interest fund.

Plaintiffs claim that section 185-20 of the Municipal Code of Chicago is applicable to the facts in the present case. We do not think that plaintiffs' position is tenable, for the



reason that said section 185-20 applies only when the property owner has paid his assessment in full and there is a surplus in the funds chargeable to the particular main for which the assessment was made.

Plaintiffs also insist that the defendant developed a method which exonerates it from paying for these water main extensions, that had been financed by special assessment, and that the fiduciary relationship between the defendant and the holders of special assessment bonds prohibits the defendant from profiteering from the defendant's operation on the water fund.

In People v. Anderson, 380 Ill. 158, where after foreclosure and sale, holders of certain bonds contended that the Village had not performed its function as trustee for the bondholders, and the sales price was grossly inadequate as to be fraudulent, the court said (at p. 162):

"The primary purpose of tax foreclosure proceedings is to clear up hopeless tax delinquency and to put the property again on a tax-paying basis. The statute is remedial. \* \* \* It was never intended that the sale be required to be for the full amount of the lien foreclosed. \* \* \* Where a foreclosure sale is made at public auction for cash to the highest bidder and in the manner prescribed by the statute, the presumption obtains that the property has produced its entire value. \* \* \* Mere inadequacy of price is no reason for upsetting a judicial sale \* \* \*."

And continuing, the court further said (on p. 165):

"No person accepting the vouchers or bonds as provided in this article shall have any claim or lien upon the municipality in any event for the payment of his vouchers or bonds or the interest thereon, except from the collection of the assessment against which the vouchers or bonds are issued."  
(Citing Rothschild v. Village of Calumet Park, 350 Ill. 330.)



Persons holding assessment bonds have no claim or lien against the Village or its general funds. Their remedies are against the special assessment money. Village of Brookfield v. Pentis, 101 F. 2d 516.

The plaintiff says that the defendant city, as trustee for the benefit of these plaintiffs, must consider any profits accruing to it because of its management of the trust assets belonging to the beneficiaries. In this case, the voucher attached to the complaint contains the provision that the voucher is payable solely out of the third installment of the special assessment warrant. The contractor, in accepting the voucher, agreed that the voucher was in "full payment of the amount stated and relinquished all claims against the City of Chicago for the work mentioned or for the payment of the voucher, except from the collection of the special assessment warrant herein named." Thus, the plaintiff cannot look to the water fund for payment. Nor is there any allegation that defendant has any money in the special assessment fund, against which the plaintiffs held bonds and vouchers, as in Rothschild v. Village of Calumet Park, 350 Ill. 330.

Plaintiffs do not contend that defendant has diverted money belonging to the special assessment funds in which plaintiffs hold bonds or vouchers. In short, plaintiffs are attempting to be paid with moneys drawn from the city water fund, which has no connection with the original special assessment. It follows that any payment from the water fund is therefore illegal.

For the reasons given, the judgment is affirmed.

AFFIRMED.

KILEY, P.J. AND MURPHY, CONCUR.  
ABSTRACT ONLY.





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HENRY V. ADAMS and BETTY M. BETTS  
ADAMS, doing business as FOUNDRY  
SUPPLIES MANUFACTURING COMPANY,

Appellees and Cross-Appellants,

v.

MATTHEW KASSNEL, doing business as  
RED DEVIL MANUFACTURING COMPANY,

Appellant and Cross-Appellee.

161A. 2d 540

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a permanent injunction, restraining defendant from using the name "Red Devil" or "Red Devil Manufacturing Company," or any like or similar name or names, in connection with the manufacturing, sale, offering for sale, distributing or advertising of an electric vibrator. Plaintiffs have cross-appealed, seeking to expand the injunction to restrain defendant from using the name "Red Devil Manufacturing Company" without limitation.

In 1918, and under the trade name "Foundry Supplies Manufacturing Company," plaintiff Henry V. Adams commenced manufacturing devices for use in the foundry trade. In 1944, the other plaintiff, Betty M. Adams, his wife, became a partner in the business. Adams invented an electric foundry match-plate vibrator, to be used in foundries for the purpose of releasing sand from a mold in the process of making a casting. In 1920 and 1922, patents were issued to Adams under the name of Henry Prell. In 1939, the patent rights on the vibrator expired. Plaintiffs advertised and sold the vibrator under



the name "~~Red~~ Electric Vibrator," and manufactured it in four sizes, designated as Nos. 1, 2, 5 and 9. From the beginning, all vibrators were painted red.

Defendant ~~Matthew~~ Kassnel was employed by plaintiffs from 1936 to 1945. In 1939, he was given the title of plant superintendent and, as such, he was in charge of all manufacturing activities, directed the purchasing of all materials and supervised the workmen. All correspondence was handled at the company office, which was several blocks from the plant. The office prepared plant orders in duplicate, and one copy, together with letters marked for or needing the attention of defendant, were delivered daily to the plant for defendant.

Kassnel was discharged January 31, 1945, for insubordination, and in March, 1945, he entered business for himself under the trade name and style of "Red Devil Manufacturing Company" and commenced the manufacture of electric vibrators, which were identical in design and numerical designation to the vibrators manufactured by plaintiffs and were painted red. In the beginning defendant made and offered for sale his No. 2 vibrator and later made Nos. 1 and 5. However, he started to make repair parts in 1945 for plaintiffs' Nos. 1, 2, 5 and 9 vibrators. He admitted that the only vibrators in existence at that time, for which those repair parts could possibly have been used, were those manufactured by plaintiffs. He registered the words "Red Devil" as a trade-mark for vibrators and other foundry equipment with the Secretary of State of Illinois in October, 1945. He advertised his vibrator as the "Red Devil Electric Vibrator." The drawings used in the manufacture of

Page 10

his vibrator were prepared by him from the information which he had gained while employed by plaintiffs and from a copy of plaintiffs' patent drawings and specifications. He procured a copy of the expired patent in February, 1945. In addition to the vibrator, defendant manufactures screw machine products, which are advertised and sold under the trade-mark "Red Devil."

Plaintiffs became aware that defendant had entered into business for himself under the trade name "Red Devil Manufacturing Company" and was manufacturing an electric vibrator identical in construction and appearance with their vibrator, which was being advertised under the name of "Red Devil Electric Vibrator," and that plaintiffs' customers were being solicited by defendant. The complaint was filed August 24, 1947. Defendant filed an answer and counterclaim. Both parties accused the other of unfair competition, based upon the use of the words "Red Devil" in connection with the manufacture and sale of electric vibrators, and each sought injunctive measures and damages.

The issues raised on the complaint and counterclaim were referred to a master in chancery, whose report was approved and confirmed by the chancellor on September 28, 1956, except as to the recommendation that defendant be restrained from using the words "Red Devil Manufacturing Company" without limitation. The chancellor dismissed for want of equity defendant's counterclaim, wherein it was sought to enjoin plaintiffs from using the words "Red Devil" in connection with the vibrator manufactured and sold by plaintiffs, and retained jurisdiction for the purpose of an accounting by defendant to plaintiffs of the profits realized by defendant on the sale, by defendant, of electric vibrators or parts thereof, under the name "Red Devil"



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or "Red Devil Manufacturing Company," and for the purpose of the determination of damages, if any, sustained by plaintiffs.

If the name "Red Devil" meant, to the trade, plaintiffs' product, plaintiffs are entitled to protection in the use of that trade name, and defendant will not be permitted to take over part of plaintiffs' business, which he must have felt he otherwise could not have obtained.

In his report the master found and concluded from the evidence (1) that the name "Red Devil" had become known to the foundry trade in connection with plaintiffs' electric vibrator for a long time prior to defendant's entry into the trade; (2) that defendant, after leaving the employ of plaintiffs, immediately and knowingly did use the name "Red Devil" in order to take advantage of the reputation and good will, which plaintiffs' vibrator had achieved; and (3) that this good will in the trade was injured by the activities of defendant.

It is well established as the law that where the findings of the master have been confirmed by the court, such findings will not be disturbed unless manifestly against the weight of the evidence. People v. LaSalle Street Trust & Savings Bank, 5 Ill. App. 2d 261; Wurth v. Hosmann, 410 Ill. 567; Kuzlik v. Kwasny, 383 Ill. 354; Litwin v. Litwin, 375 Ill. 90.

Plaintiffs offered in evidence many orders for vibrators and repair parts, wherein the customers used the name "Red Devil." These exhibits ranged in dates from June, 1933, to





January, 1945. Witness Murray, for plaintiff, testified that he was purchasing agent since 1928 of one of the five largest foundry suppliers in the country; that during that time he sold a great number of plaintiffs' vibrators; that they were referred to as "Red Devil Vibrators" and sometimes as "Red Electric Vibrators," and that before 1945 the name "Red Devil," when referring to vibrators, meant plaintiffs' product.

Within a week or two after his discharge, defendant decided to manufacture plaintiffs' vibrators and shipped his first vibrator in August, 1945. He prepared and sent out letters soliciting orders for his No. 2 vibrator, and these letters were sent to different foundry supply houses in the United States. He used two different types of letterheads. On one, in the upper lefthand corner, it read "Manufacturers of Red Devil Electric Vibrators." On the other, and in the same place, it read "Screw Machine Products." On October 24, 1945, he registered "Red Devil Manufacturing Company" as a trade-mark with the Secretary of State of Illinois.

Adams testified that the two vibrators were identical in construction and appearance; that in the housing on the back of his vibrator appeared "Foundry Supplies Manufacturing Company," and in the housing on the back of defendant's vibrator appears "Red Devil Manufacturing Company"; and that on plaintiffs' vibrator is a little brass tag which says "Foundry Supplies



Manufacturing Company," and on the same place on defendant's vibrator is a little brass tag that says "Red Devil Manufacturing Company." There were some minor and slight differences in the vibrators which could be seen on close examination. Defendant's contention that the record is devoid of any evidence that plaintiffs used the name "Red Devil" prior to its use by defendant is without merit. It is noted that plant orders in evidence, which were delivered to defendant during his employment by plaintiffs, carried the name "Red Devil," and the orders in evidence for vibrators and repair parts, wherein the customer used the name "Red Devil," covered a period from 1933 to 1945, and it is fair to assume that plaintiffs accepted and filled these orders, demonstrating plaintiffs' prior use, acceptance and appropriation of the name "Red Devil" in connection with plaintiffs' vibrators and parts.

The rule has been for many years that on the expiration of a patent, the monopoly granted by it ceases to exist, and the right to make the device formerly covered by the patent becomes public property, which includes the form in which it was constructed during the patent. Singer Mfg. Co. v. June Mfg. Co., 163 U. S. 169 (1896); Kellogg Co. v. National Biscuit Co., 305 U. S. 111 (1938); DeLong Co. v. Hump Hairpin Co., 297 Ill. 359 (1921). The rule includes the right to manufacture repair parts for the device covered by the expired patent and to adopt the letters or numbers used solely to describe and distinguish the sizes, styles, grades or qualities of the device. Bender v. Enterprise Mfg. Co., 156 Fed. 641 (1907); Germanow v. Standard



Unbreakable Watch Crystals, Inc., 27 N. E. 2d 212 (1940); 26 R. C. L. 911; American Enameled Products Co. v. Illinois Porcelain Enamel Co., 123 F. 2d 631 (1941).

As a rule, color cannot be monopolized to distinguish a product, and color alone, unaccompanied by any distinguishing sign, seal or symbol, is not sufficient to constitute a trademark. Landis Machinery Co. v. Chaso Tool Co., Inc., 141 F. 2d 800 (1944); Life Savers Corp. v. Curtiss Candy Co., 182 F. 2d 4 (1950); 150 A.L.R. 1100. Therefore, although defendant knew plaintiffs had been using the color red on their vibrators for many years, and knew that other colors such as green and white could be utilized, as well as red, nevertheless the fact that he knowingly chose the color red for his vibrator is not sufficient in itself to warrant the court in granting injunctive relief. The chancellor did not restrain defendant from using the color red on his vibrators.

Whether or not a claim based on unfair competition exists depends upon the peculiar facts of each case. Generally speaking, it can be said that in all cases of unfair competition, it is the principles of old-fashioned honesty which are controlling. Jewel Tea Co., Inc. v. Kraus, 187 F. 2d 278 (1950). In the instant case, defendant was free to copy plaintiffs' vibrator and to make it in the form in which it was constructed during the patent, to use the numbering system of plaintiffs, make parts to fit plaintiffs' vibrators, and even to adopt the color red, provided, however, he did not step into the area of unfair competition. Courts of equity will grant injunctive relief in a situation demonstrating unfair competition. An



examination of the cases in which injunctive relief has been granted because of unfair competition indicates that, where acts of improper competition are shown, the courts will not hesitate to lend their aid to fostering commercial morality by an appropriate injunction, and the court will endeavor to adapt its relief to the general equities of the particular situation as nearly as it is possible to do so. J. C. Penney Co. v. H. D. Lee Mercantile Co., 120 F. 2d 949 (1941).

Where the alleged trade-mark is not in itself a good trade-mark, but the use of the name has come to denote a particular manufacturer or vendor, such relief against unfair competition will be granted as will prevent misapprehension on the question of origin. DeLong Co. v. Hump Hairpin Mfg. Co., 297 Ill. 359 (1921); Elgin National Watch Co. v. Illinois Watch Case Co., 179 U. S. 665 (1901).

In Coca-Cola Co. v. Koke Co. of America, 235 F. 408 (1916), at the request of plaintiff the court enjoined the use by defendant of "Koke," because the name had come to mean the product Coca-Cola, although the Coca-Cola Company did not advertise or sell under this name. On page 414, the court said:

"It may be that these resemblances, standing alone, would not, in themselves, justify any relief against a person using them in good faith, but, when considered in the light of all the evidence in this case, I cannot reconcile them with fairness."

In the case of Q-Tips, Inc. v. Johnson & Johnson, 206 F. 2d 144 (1953), the court enjoined defendant from continuing to use the name "Cotton Tips" for a product similar to plaintiff's "Q-Tips," saying, on page 147:

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"One of the elements to be considered in deciding whether there is confusing similarity is the intent of the actor who adopts the designation."

The question is whether or not defendant chose the trade name "Red Devil" with a deliberate purpose to obtain some advantage from the trade plaintiffs had built up. There is proof of the good will built up by plaintiffs over many years and the general acceptance by the trade of the style, color, name and appearance of plaintiffs' product, indicating it was plaintiffs' product. These valuable assets of plaintiffs were suddenly pre-empted by defendant, and the customers of plaintiffs were solicited to purchase defendant's product.

Many devices are developed for taking advantage of the good will of other men's businesses and to avoid the common law of trade-marks. To protect the honest business man against these impostors, equity developed the law of unfair competition and will protect the good will and reputation of an established business. If the conduct complained of is likely to cause confusion of the traders, so that the public believes, or is likely to believe, that the goods of the defendant are the goods of the plaintiff, or that the plaintiff is in some way connected with or is a sponsor for the defendant, then a sufficient case is made out for injunctive relief. Lady Esther, Ltd. v. Lady Esther Corset Shoppe, 317 Ill. App. 451 (1943). Even in the absence of express and deliberate fraud, equitable relief will be readily granted if bad faith is shown on defendant's part, i.e., an intention of defendant to gain advantage from the reputation and good will of plaintiffs' trade name. Lone Ranger, Inc. v. Currey, 79 F. Supp. 190 (1948).



Defendant contends that the registration by him of the trade-mark "Red Devil," with the Secretary of State of Illinois on October 24, 1945, buttressed his right to the exclusive use of the trade-mark "Red Devil." Registration does not and cannot create or bestow the exclusive right to use a trade-mark, nor does the statute so provide; nor can it vest a title in the registrant as against another's common law title. The good will of the public and the trade-mark indicative of the electric vibrator manufactured and sold by plaintiffs were plaintiffs' property at the time of the filing of the trade-mark by defendant. Coca-Cola Co. v. Stevenson, et al., 276 F. 1010 (1920).

We believe the rule to be that registration of a trade-mark simply constitutes prima facie evidence that the registrant is entitled to the mark, but this can be rebutted, and the right to the protection of the name depends upon it having been identified with a particular product, and the registration creates no additional substantive rights in that name. United States Ozone Co. v. United States Ozone Co., 62 F. 2d 881. In view of the master's finding that the name "Red Devil" had become known to the foundry trade in connection with plaintiffs' electric vibrator for a long time and prior to defendant's entry into the trade, defendant's registration of the name with the Secretary of State did not create for defendant the right to use the trade-mark or trade name "Red Devil" in connection with defendant's vibrator, which was a copy of plaintiffs' vibrator.

Plaintiffs cross-appeal from the decree claims error, because the decree fails to include an injunction against



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-11-

defendant using the name "Red Devil Manufacturing Company" without limitation. The evidence shows that defendant manufactures screw products, which are not competitive with any product of plaintiffs. There was no reason, therefore, to extend this extraordinary remedy to those products.

For the reasons given, the decree of the trial court is affirmed in all respects.

DECREE AFFIRMED.

KILEY, PJ. AND LEWE, J., CONCUR.

ABSTRACT ONLY.



-11-

defendant using the name "Red Devil Manufacturing Company" without limitation. The evidence shows that defendant manufactures screw products, which are not competitive with any product of plaintiffs. There was no reason, therefore, to extend this extraordinary remedy to those products.

For the reasons given, the decree of the trial court is affirmed in all respects, and the matter is remanded to the trial court for such further action as may be consistent with its decree herein affirmed.

DECREE AFFIRMED.

KILEY, P.J. AND LEWE, J., CONCUR.

ABSTRACT ONLY.





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47216

KAPLAN'S, INC., an Illinois corporation,

Appellant,

v.

AETNA INSURANCE COMPANY, a corporation,

Appellee.

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16 I.A.<sup>2d</sup> 541

APPEAL FROM THE

MUNICIPAL COURT

OF CHICAGO.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

At the conclusion of plaintiff's case, on defendant's motion, the trial court directed the jury to return a verdict in defendant's favor. Defendant introduced no evidence. Plaintiff appeals.

Plaintiff sued on a Furriers' Customers Basic Policy, seeking to recover damages arising out of a burglary loss, in which customers' coats were stolen. Plaintiff's theory is that the evidence, taken in its most favorable light, warranted submission of the case to the jury on the question of whether there had been (1) such performance of conditions on plaintiff's part as to substantially satisfy policy requirements, and (2) such a waiver or estoppel on defendant's part as to preclude the defenses raised by the pleadings.

On March 1, 1946, defendant issued plaintiff its policy, insuring plaintiff against losses incurred by it in the acceptance by it for storage, alteration and cleaning, of customers' fur garments. The insuring clause of the policy stated that it covered furs " \* \* \* for which the named assured issues a receipt which includes an agreement that the named assured shall effect insurance and contains the provisions required by Condition 1 of this policy." Condition 1 is:



- "1. Each receipt \* \* \* given to customers shall in effect provide that

\* \* \*

(b) the named Assured will have effected for the benefit of the customer insurance on each article listed in the receipt which shall, in terms usual to such insurance, cover against loss by fire and theft for the value set opposite each item, which value shall also be stated to be the limit of the named Assured's liability for any loss of or damage to said article;

(c) the provisions of the receipt shall inure to the benefit of the Company to the same extent that they inure to the benefit of the named Assured;

\* \* \*.

Plaintiff admits that it did not issue any receipt to any of its customers, which complied with the coverage clause and the conditions in the policy. Instead, plaintiff used a two-part check; the top part was attached to the garment, and the bottom part was given to the customer. It did not give the name of the customer, made no reference to insurance or any amount thereof, contained no valuation of the garment, did not limit liability to a stated amount, and did not provide that the provisions of the receipt shall inure to the benefit of the insurer.

The policy issued is a standard form, in common usage throughout the United States. The policy also provided that the assured shall keep an active record of all receipts issued, and shall report to the company each month the aggregate amount of values set forth in all outstanding receipts, and pay a premium thereon at rates provided. The basis for computation of premiums was the value amounts listed on the receipts, which



values would be the limit of the assured's and the defendant's liability in each loss. The issuance of a receipt, in accordance with the provisions of the coverage clause and the Conditions in the policy, was necessary before any insurance became effective. In other words, failure to issue a receipt containing the stipulations required by the policy resulted in no insurance coverage. DeLeo v. American Eagle Ins. Co., 134 N. Y. S. 2d 576 (284 App. Div. 886). In oral argument in this court, plaintiff's counsel admitted that plaintiff had not issued a receipt to any customer containing the stipulations required by the policy.

Plaintiff contends that defendant waived its right to use the non-receipt defense, and as a basis for this contention urges the failure by defendant to require plaintiff to file monthly reports or pay premiums, as required by the policy. The policy called for a report each month by plaintiff, setting forth the total value covered by the receipts issued by it to customers, and from this total value figure, defendant was to compute the premium to be paid by plaintiff. It is agreed by the parties that plaintiff filed its reports irregularly, and some reports covered many months at a time, and all were in "round figures," to which practice defendant did not object and at no time inspected any of the records of plaintiff.

Plaintiff urges that this conduct was notice to defendant that plaintiff might not be conforming to the policy requirements on the issuance of receipts; that there was a duty placed on defendant to inspect plaintiff's records and procedure in the issuance of receipts; and that thereby

11. The Commission has been informed that the Government of India has decided to send a mission to the United States to study the American system of higher education. The mission is to be headed by the Minister of Education, Government of India, and will consist of a number of officials of the Ministry of Education, Government of India, and a number of officials of the Ministry of Education, Government of India.

defendant lulled plaintiff into the belief that literal compliance with the receipt Conditions was not required. We do not agree with this contention. It is a fundamental rule of law that waiver must be predicated on knowledge of an existing right and an intention to relinquish it and must be proven by clear, precise and unequivocal evidence. Spence v. Washington National Ins. Co., 320 Ill. App. 149; Acme Feeds, Inc. v. Daniel, 312 Ill. App. 330.

The acceptance by defendant of irregular reports, which should have been prepared from receipts issued to customers by plaintiff, did not amount to a voluntary and intentional relinquishment or abandonment of a known existing right of defendant. Defendant was entitled to assume that the reports were prepared by plaintiff from receipts which had been issued and were in existence, and there was nothing to inform defendant that the figures set forth in the irregular reports were "a round number" based on plaintiff's "general estimate" of values of garments in its custody.

A motion for a directed verdict at the close of plaintiff's evidence presents a single question, whether there is in the record any evidence which, standing alone and taken with all its intendments most favorable to the plaintiff, tends to prove the material elements of his case (Lindroth v. Walgreen Co., 407 Ill. 121), and if there is a total failure to prove one or more of the necessary elements of the action, the motion for a directed verdict should be allowed (Dregne v. Five Cent Cab Co., 381 Ill. 594; Tucker v. N. Y., C. & St. L. R. Co., 12 Ill. 2d 532).





In the instant case there is no evidence from which an inference legitimately may be drawn that plaintiff issued receipts in substantial accordance with the policy, on which it seeks recovery, or which would excuse plaintiff's failure to issue these receipts, the issuance of which was necessary before any insurance became effective.

Accordingly, the judgment of the trial court must be affirmed.

JUDGMENT AFFIRMED.

KILEY, P.J., AND LEWE J., CONCUR.

ABSTRACT ONLY.



47149

STANLEY LIND, et al.,

Appellees and Cross-Appellants,

v.

CHESTER CARSON and TERRANCE HOWARD,

Appellants and Cross-Appellees.

16 I.A. 542<sup>2d</sup>

APPEAL FROM

SUPERIOR COURT,

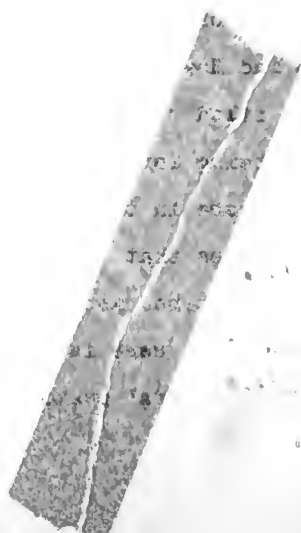
COOK COUNTY.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an injunction restraining defendants from soliciting the customers of plaintiffs, their former employers.

Plaintiffs, since 1941, have been partners in the exterminating business, with principal place of business in Chicago, under the name of "American Laboratories." Defendant Carson was in their employ, beginning in 1945, and in 1954 he was made supervisor, with duties of personnel, purchasing and mixing materials, and with access to plaintiffs' customer lists. Defendant Howard was employed by plaintiffs as an exterminator in 1951. Carson and Howard formed a partnership about May 31, 1956, with the name "Arrow Pest Control." On June 22, 1956, plaintiffs discharged Carson and Howard for soliciting plaintiffs' customers. Plaintiffs filed this suit June 28, 1956.

Defendants admitted being former employees of plaintiffs, and also that they were in the exterminating business. They denied plaintiffs' allegations that they had, while in plaintiffs' employ, wrongfully combined and conspired to take plaintiffs' business away; that they were in positions of trust in which they obtained plaintiffs' customer lists and



trade secrets, in violation of the trust; that they used the lists to fraudulently solicit plaintiffs' customers and divert plaintiffs' business to their own partnership; that they used plaintiffs' equipment to render services for Arrow Pest Control; and further denied that plaintiffs suffered damages, necessitating an accounting.

Plaintiffs prayed for a temporary and permanent injunction, restraining defendants from soliciting plaintiffs' former customers, for an order on Carson to deliver up a Cadillac automobile owned by plaintiffs, and for an accounting. The court denied a motion for a temporary injunction and referred the matter to a master in chancery, who filed his report on October 18, 1956, recommending that a decree be entered against defendants.

On October 23, 1956, the chancellor approved the report and entered the decree as recommended. Defendants were enjoined from soliciting or servicing for themselves plaintiffs' customers as of June 22, 1956, or in any wise doing any exterminating work for such customers; Carson was ordered to return the Cadillac; and plaintiffs' damages were found to be \$1535.20, made up of \$400 loss of income for a job done in Bloomington by defendants, while still employed by plaintiffs, and \$1135.20, loss of income for a period of a month and a half, from accounts taken over by defendants from plaintiffs. The court retained jurisdiction of the cause to enforce the provisions of the decree and for the purpose of passing on the question of damages, if any, which may accrue to plaintiffs since August 18, 1956.



On May 26, 1956, defendants engaged a lawyer to prepare a partnership agreement, and they signed it May 31, 1956, while in plaintiffs' employment. In May they registered the name of "Arrow Pest Control" with the County Clerk, obtained a telephone number and an address for the receipt of mail, hired an agency to accept telephone calls, and prepared mimeographed notices of cancellation to be used by them in soliciting accounts of plaintiff. In May and the early part of June, defendants actively solicited plaintiffs' accounts, securing a number of cancellations effective July 1, 1956, when they were to take over the accounts.

Early in June, they took over plaintiffs' Hutchinson account at Bloomington, performed the work, and on June 18 received \$550. Hutchinson had requested service from plaintiffs on or about May 8. This information was given by plaintiffs to Carson to secure the work for plaintiffs, but defendants took over and serviced the account for their own use and benefit. Plaintiffs, in May and June, turned over to Carson a number of new accounts for solicitation, but instead he secured these accounts for defendants. June 22, 1956, plaintiffs learned of defendants soliciting plaintiffs' customers and immediately discharged defendants. Up to that time defendants had solicited and obtained over 200 accounts of plaintiffs. After their discharge, defendant induced David Alonzo, plaintiffs' employee, to solicit plaintiffs' customers for the benefit of defendants and later induced Alonzo to leave the employ of plaintiffs and become a partner with defendants. Defendants took accounts of plaintiffs having a net total of \$1,080 per month.

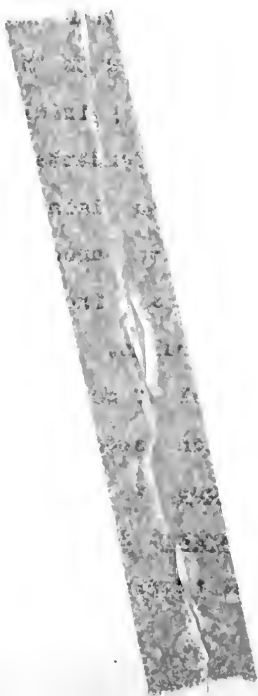




A number of customers testified on behalf of plaintiffs. One was solicited by Howard about the first week in June and signed a cancellation effective July 1. Another was solicited on June 14 and signed a cancellation on that date. Another signed a contract on June 22, after having called American Laboratories about a month before.

It is evident that defendants, while employees of plaintiffs, did conspire with each other and fraudulently took over customers of plaintiffs, their employers. They undertook to obtain the very essence of plaintiffs' business. Their conduct shows that they set about secretly to appropriate for their own profit the established customers of plaintiffs' business and to use plaintiffs' exterminatory formulae, sources of materials and, until they were discharged, plaintiffs' vehicles.

While employed by plaintiffs, defendants occupied a fiduciary relationship and were charged with the duty of loyalty and fidelity. A fiduciary cannot deal with the subject matter of the relation and then use for himself gainfully any information obtained by him in regard thereto. Defendants, during their employment, were obligated to render to plaintiffs good faith and loyalty. There was nothing of importance about the business with which defendants were not familiar, including the names of all customers and exterminatory formulae. Their activities in May and June demonstrated a betrayal of confidence. Equity will prevent the continuance of such conduct in a proper case. Suchy v. Fajicek, 364 Ill. 502; Done v. Phoenix Land Bank, 381 Ill. 106; Consumers Co. v. Parker, 227 Ill. App. 552. We believe the evidence sustains the findings of the chancellor

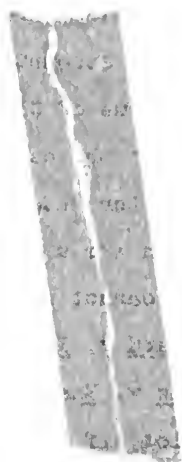


and the order enjoining defendants from soliciting and servicing for themselves plaintiffs' customers, who were customers as of June 22, 1956, or in any wise doing any exterminative work for such customers.

The evidence sustains the finding of damages in the sum of \$1535.20. Equity will not permit an agent who has profited from violating a relationship of trust and confidence to retain his gains and will compel him to turn over the gains to one equitably entitled thereto. 56 C. J. S. 481; Doner v. Phoenix Land Bank, supra; Suchy v. Hajicek, supra.

A cross-appeal was filed by plaintiffs. The master made a finding that plaintiffs' business was a successful and lucrative one; that defendants took over accounts, from which plaintiffs lost monthly a net total income of \$1,080; and that said loss will continue for two years to the damage of plaintiffs of \$25,920. The trial court did not enter judgment for this item. This was correct. Damages which are uncertain, contingent, remote or speculative in their nature cannot be made the basis of a recovery. 15 I. L. P. 458; Hippard v. Illinois Power & Light Corp., 317 Ill. App. 47; Salaban v. East St. Louis Water Co., 284 Ill. App. 358. The injunction, if properly enforced, will prevent defendants from servicing the same accounts for which the master recommended an allowance of future damages.

The chancellor ordered the return of the Cadillac automobile and found it to be the property of plaintiffs. It belonged to the firm and was used by Waltz. The certificate of title was in his name, endorsed in blank and held by the



bookkeeper. Carson claimed it as a gift from Waltz. Waltz testified that Carson wanted to buy the car; that he told Carson that he could drive it if he paid for the license; that he did not say anything about giving it to Carson; that he gave Carson the keys and told him that in order to get the license, he would have to get the title changed, and that Mrs. Mitchell (bookkeeper) had the title. This was early in May and was the only conversation about the car. On June 22, Waltz demanded Carson return the Cadillac.

Carson testified, "Around the first of May he (Waltz) said I could have his car and told me I had worked hard for him and this is one way he could pay me back. \* \* \* he told me I could pick up the title at the office and Mrs. Mitchell would have it all made out for me." Mrs. Mitchell testified she did not talk to Waltz about it and received no directions from him but took instructions from Carson because he was the supervisor, and she asked no questions. Defendants claim this satisfied the legal requirements of making a gift. The trial court found otherwise and directed the car be returned to plaintiffs. We believe the authorities sustain this, and defendant Carson failed to prove that a gift was made to him of partnership property.

In Illinois it is the rule that to sustain a gift, the one claiming a gift must prove such gift by clear and convincing testimony. The law never presumes a gift. The essential facts are the delivery of the property by the donor to the donee with intent to pass the title. Bolton v. Bolton, 306 Ill. 473. It is true that the certificate of title is prima facie evidence of ownership and furnishes a ready means of ascertaining



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the true ownership of an automobile (Mori v. Chicago National Bank, 3 Ill. App. 2d 49), but in the instant case the facts are not clear and convincing proof of the intent to make a gift of the automobile at the time of the transfer of title.

This court finds the evidence and the law sustain the decree of the trial court. Accordingly, the decree is affirmed.

DECREE AFFIRMED.

KILEY, P.J., AND LEWE, J., CONCUR.

ABSTRACT ONLY.





47229

GEORGE PILURS,

Appellant,

v.

ELCO CONSTRUCTION CO., a corporation,  
SAMUEL CINMAN and DIMITRA KLEMENTZOS,

Appellees.

16 I.A.<sup>2d</sup> 543

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court, dismissing the amended complaint as to defendants Elco Construction Company and Samuel Cinman, hereafter referred to as Elco and Cinman. The amended complaint contains two counts. Count I seeks damages from defendant Klementzos, and Count II seeks damages from Elco and Cinman. Elco and Cinman moved to strike Count II of the amended complaint or to dismiss them from the suit. On February 27, 1957, the court ordered that the cause be dismissed as to them, with their costs from plaintiff. The court entered a finding that there was no reason for delaying enforcement of or appeal from the order. Civil Practice Act, par. 50 (2).

Count I of the amended complaint alleges that plaintiff is a contractor and manufacturer, supplying interior fixtures for retail merchandising rooms and establishments; that defendant Klementzos had a contract with defendants Elco and Cinman for the erection of a new and modern structure for her use in the restaurant business; that defendant Klementzos contracted with plaintiff to make, supply and install certain fixtures and appliances in the restaurant premises for the



sum of \$24,566; that defendant Klementzos accompanied plaintiff to supply houses and manufacturers and plaintiff ordered items; that plaintiff performed all the conditions of the contract by him to be performed; that the fixtures and appliances were made specially to conform to specifications and are not usable elsewhere; that plaintiff and his employees expended labor and work in preparing the premises for the installation of said fixtures and appliances; that defendant Klementzos refused to permit plaintiff to proceed with his work of conforming said premises for the installation of the fixtures and appliances; that said breach of contract was induced, brought about and caused by the malicious, wilful and evil conspiracy of the three defendants, to oust plaintiff from said contract and to gain for themselves whatever profit might be made by plaintiff if said contract had proceeded to completion; that in furtherance of said conspiracy to breach plaintiff's contract, the defendants endeavored to deal directly with the manufacturers of the fixtures and appliances and repurchase the same, and thus bypass plaintiff; that plaintiff has suffered damages in the sum of \$30,000 by reason of the breach of defendant Klementzos, and prays judgment against her for the sum of \$30,000 as actual damages and the further sum of \$30,000 as punitive damages, and that malice be determined to be the gist of the action.

Count II substantially alleges Count I, and additionally: that defendant Elco is an Illinois corporation, engaged in the construction of new buildings, and defendant Cinman is its agent in that work; that defendants Elco and Cinman, knowing



-3-

of the existence of the contract between plaintiff and defendant Klementzos, with malice and wilful intent, confederated with, conspired and induced defendant Klementzos to break her contract with plaintiff and caused her to refuse to perform her part of plaintiff's contract; that the malicious and wilful acts of these two defendants damaged plaintiff, and prays for judgment as in Count I.

Plaintiff contends that his action for damages for the breach of contract lies against the contractee and third persons who, knowing of said contract and its provisions, induced and conspired with the contractee to breach said contract and interfere with its performance; that said third persons may be joined in responsibility with the contractee for the wrong done plaintiff; and that the amended complaint states a good cause of action against all three defendants. Defendants contend "the complaint is absurd" but cite no authorities in support of this position.

Defendants' motion to strike admits the facts well pleaded, and although the amended complaint is construed most strongly against plaintiff, he is entitled to the reasonable intendments of the language used in the amended complaint, and a plaintiff need not allege with precision facts which are within the knowledge of defendants rather than of plaintiff. Field v. Oberwortmann, 14 Ill. App. 2d 218.

A conspiracy is an agreement or combination formed between two or more persons, to do an unlawful act or to do a lawful act by unlawful means. Franklin Union v. People,



220 Ill. 355. To persuade a person to break his contract may not be wrongful in law or in fact, but if the persuasion be used for the purpose of injuring the plaintiff and inducing the breach, it is actionable if injury ensues from it, and one who has wrongfully induced a breach of contract cannot claim that the plaintiff, in an action against him therefor, is not damaged because he has a cause of action for the breach against the other party to the contract. Doremus v. Hennessy, 176 Ill. 608; 26 A. L. R. 2d 1257; Meadowmoor Dairies v. Drivers' Union, 371 Ill. 377; Pure Milk Ass'n. v. Kraft Foods Co., 8 Ill. App. 2d 102.

All persons who unite to induce a breach of contract are jointly and severally liable for the damage to the party injured thereby.

An examination of the amended complaint shows that it contains all the essential allegations necessary to set forth a cause of action for wrongfully inducing a breach of contract, based on a conspiracy participated in by the defendants Elco and Cinman.

Therefore, the order of the trial court dismissing the amended complaint as to defendants Elco and Cinman is reversed and the matter remanded to the Circuit Court for such action as may be appropriate.

REVERSED AND REMANDED.

KILEY, P.J., AND LEWE, J., CONCUR.

ABSTRACT ONLY.





197

A

NO. 11095

(Publish Abstract only)

Agenda 1.

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT, FIRST DIVISION

FEBRUARY TERM, A. D. 1958

HERMAN BLANDFORD, JR., CLARENCE  
BECKMAN and JACK FOULKE,

Plaintiffs-Appellants,

vs.

BLANCHE CONNERY, d/b/a Connery  
Freight Lines, and HILTON L. VOWELL,

Defendants-Appellees.

161.A.<sup>2</sup>544

Appeal from

the Circuit Court

of Bureau County

McNEAL, J.--

About 11:15 P.M. on February 2, 1950, Herman Blandford, Jr. was driving an automobile in a westerly direction on Route 6 about one mile east of Wyandot and collided with the rear end of a tractor-trailer driven by Hilton L. Vowell. In a complaint filed on February 1, 1952, plaintiff Blandford alleged in count I: that defendant Vowell was an agent and employee and engaged in the business of the defendant, Blanche Connery; that defendants permitted the tractor-trailer to be parked or stalled on the highway without any taillights or other illuminated signals to warn persons lawfully on the highway, and failed to set up flares or other signals to warn approaching motorists of its presence on the highway; and that as a proximate result thereof the automobile was caused to run into the tractor-trailer. Blandford claimed that damages to his automobile and for his personal injuries amounted to \$5000, and prayed for judgment in that amount against defendants. In counts II to V, inclusive, plaintiffs Jerry Klingenberg, Wendell Klingenberg, Jack Foulke and Clarence Beckman severally alleged that each of

IN THE  
ALABAMA COURT OF THE COMMON PLEAS  
SOUTHERN DISTRICT, NINTH JUDICIAL CIRCUIT  
JANUARY TERM, A. D. 1932

44-2-3-6

THOMAS SHANNON, JR., CAPTAIN  
TECHNICAL AND FACT FINDING

Plaintiffs-Appellants

vs.

THOMAS SHANNON, JR., CAPTAIN  
TECHNICAL AND FACT FINDING

Plaintiffs-Appellants

Memorial, 11-03

About 1:15 P.M. on February 1, 1932, the defendant, who was driving an automobile in a southerly direction on Highway No. 1, east of Mobile and collided with the plaintiff's tractor-trailer driven by Milton D. Webb. The collision occurred on February 1, 1932, plaintiff's tractor-trailer being at the time being driven by plaintiff and engaged in the business of transporting, storing and shipping that defendant's tractor-trailer be so parked or stalled on the highway without any lights or other illuminated signals to warn persons traveling on the highway, and failed to set up flares or other signals to warn approaching motorists of its presence on the highway; and that as a proximate result thereof the automobile was caused to run into the tractor-trailer. Plaintiff claimed that damages to his automobile and for his personal injuries amounted to \$5000, and prayed for judgment in that amount against defendant. In counts II to V, inclusive, plaintiff's Jerry Klingenberg, Wendell Hinton, Berg, Jack Boulike and Clarence Beaman severally alleged that each of

them was a "guest" passenger in the automobile driven by Blandford, claimed damages for personal injuries amounting to \$10,000, \$15,000, \$20,000 and \$50,000, respectively, and prayed for several judgments in those amounts against defendants. Each plaintiff alleged that he was in the exercise of due care. When the action was commenced, each plaintiff was a minor and the suit was brought by his father or mother as his next friend.

In October, 1955, plaintiffs Blandford, Jerry Klingenberg, Foulke and Beckman filed an amended four count complaint. In addition to the matters contained in their original counts, it was alleged that defendants' acts were in violation of section 121 (b), Article XV, of the Uniform Act Regulating Traffic on Highways (Par. 218, Ch. 95 $\frac{1}{2}$ , Ill. Rev. Stat. 1951); and that each plaintiff's parents had waived any right to recover medical expenses and loss of wages during plaintiff's minority, and had consented to recovery of such expenses and loss by the minor plaintiff. In their answer defendants admitted that Vowell was in control and possession of the tractor-trailer, but denied: that he was Connery's agent and employee, that the tractor-trailer was stalled on the highway, that the tractor-trailer was without taillights or other illuminated signals, and that it was in any condition or position where flares were required.

On October 22, 1956, plaintiffs Jerry and Wendell Klingenberg dismissed their actions against defendants. The other three plaintiffs suggested that they were of age and they were permitted to prosecute their suits in their own proper persons. Assignments of claims for medical expenses and loss of wages to the plaintiffs were executed by the parents on October 24, 1956, but the court sustained defendants' objections to filing the assignments on the ground that they were barred by the statute of limitations. On October 26, 1956, a jury returned verdicts finding the defendants not guilty, and judgment was entered. Plaintiffs' motions for a new trial and for judgment notwithstanding the verdicts were denied, and plaintiffs appealed.

Plaintiffs contend that the verdicts were against the manifest

Plaintiffs contend that the verdicts were against the manifest weight of the evidence. On October 20, 1960, a jury returned verdicts finding the defendants not guilty, and judgment was entered. Plaintiffs' motions for a new trial and for judgment notwithstanding the verdict were denied, and plaintiffs appealed.

weight of the evidence; and that the court erred in giving certain instructions for defendants and in denying plaintiffs leave to file their parents' assignments of claims for medical expenses.

At the time of the collision Herman Blandford, Jr., nineteen years of age, was driving his father's 1937 Ford tudor sedan. Jerry and Wendell Klingenberg were in the front seat. Clarence Beckman, aged sixteen, was on the right side of the rear seat. Jack Foulke, fourteen, was seated on the rear seat with his elbows on the back of the front seat between the driver and Wendell Klingenberg. The Klingenberg boys were not called as witnesses. Clarence Beckman was asleep at the time and knew nothing about the collision. Plaintiffs' proof of the occurrence rests upon the testimony of Herman Blandford and Jack Foulke.

Blandford had been with the Klingenberg boys at a skating rink and picked up Beckman and Foulke at a bowling alley in Princeton. Blandford testified that the weather was clear and cold. He drove the car at a speed of 45 or 50 miles an hour going west out of Princeton. As he approached the scene of the collision the highway went over the crest of a hill. Another vehicle with very bright lights was coming up the hill. Blandford's lights were on dim and threw a beam about 150 feet ahead. Just as he passed the eastbound car he saw a truck stopped on the north side of the pavement, 40 to 50 feet ahead of him. The truck had no lights on it. There was no time to put the lights on full or to apply the brakes, and Blandford's car hit the truck.

Jack Foulke testified that Blandford was driving 45 to 55 miles an hour with his lights dimmed. Right after the vehicle with the bright lights passed, he saw the truck and trailer loaded with steel rods, directly ahead, blocking the north half of the road. There were no lights burning on the truck. It was not over three car lengths ahead. There wasn't time to put on the brakes or turn out of the way--not even time enough to scream. Foulke also testified that in the fall of 1954 at a restaurant in Wyandot, in the presence of Jim Alvey and George Lampkin, he had a conversation with the truck driver, Hilton Vowell.



According to Foulke's version of the conversation, corroborated in part by Alvey and Lampkin, Vowell admitted that he had been having trouble with the truck--the motor was cutting out and the lights dimming down, the truck stopped on the highway, and his brother suggested setting out some flares, but before he could put them up the collision occurred.

Hilton Vowell admitted that he had a conversation with Foulke at the restaurant in Wyandot, but denied that he told him that he had trouble with the lights or that the truck was stopped on the highway. He testified that the only difficulty he had with the truck was a vacuum leak when he was two or three miles from Wyandot. This condition made the tractor pull a little slower, but had no effect on the lights. Vowell's unit was about 150 feet over the crest of a hill, moving 15 to 20 miles an hour, another vehicle with bright lights was coming up the hill, when he was jolted by the impact of Blandford's car hitting the rear of the trailer. After the impact he stopped the truck and he and his brother used a flashlight to stop other traffic and set out flares. Blandford's car was jammed underneath the trailer. The temperature was near zero and there was no snow or moisture on the pavement. After the boys were taken to the hospital Vowell drove the unit to Kewanee where the trailer was welded so it wouldn't run sideways, a clamp on the vacuum was tightened, and he proceeded to his destination.

Vowell purchased the unit which consisted of a 1948 GMC tractor and a 1946 Fruehauf trailer, about three months before the accident. He testified that the ignition and lighting systems were in good condition. There were three lights in the center and two red lights on each corner on the rear end of the trailer. The trailer was loaded with five bundles of steel bars 25 to 26 feet in length, and weighed about 30,000 pounds. Vowell picked up the loaded trailer at a warehouse in Chicago and drove the unit to the office of the Connery Freight Lines where a trip lease was made out. The lights were inspected and found to be in working order. Vowell drove the unit to a gas station in Brookfield where the gas tank was filled and lights checked. He left Brookfield about 6:30 P.M. and





made no stop until the accident occurred. His brother, who was with him at the time of the collision, was engaged as a truck driver in Texas and could not be located at the time of the trial.

When the accident occurred, Vowell was enroute to Canton under a trip-lease to Connery Freight Lines. The lease provided that Vowell would receive 75% and Mrs. Connery 25% of the transportation charges. William F. Connery was called as a witness under section 60 of the Civil Practice Act. Connery corroborated Vowell's testimony with reference to the trip lease arrangement, and further testified that his father who was general manager of the Connery Freight Lines at the time of the collision, has died since the accident; and that Connery Freight Lines owned no equipment in 1950.

The testimony of plaintiffs Blandford and Foulke that the truck was standing on the pavement without lights at the time of the collision was contradicted by defendant Vowell's testimony that his unit was moving 15 to 20 miles an hour with all lights burning at the time of impact. Where the testimony of witnesses is conflicting, it is for the jury to determine the credibility of the witnesses and the weight to be given their testimony. The jury saw the witnesses, heard them testify, observed their demeanor on the stand, and were in a better position than we are to determine whether Vowell or Blandford and Foulke were telling the truth. Likewise it was for the jury to determine whether the collision was proximately caused by Blandford's negligence in driving his car with lights dimmed 45 to 55 miles an hour into the rear of the trailer, whether it was with or without lights and moving or standing on the pavement, and to determine whether Vowell was an agent or servant of the Connery Freight Lines and guilty of any negligence which proximately caused the collision. On either of these questions of fact we think there was competent evidence to support the jury's verdicts adverse to plaintiffs' contentions and in favor of defendants. It is not the province of this court to substitute its judgment for that of a jury unless the verdict is against the manifest weight of the evidence.



To be against the manifest weight of the evidence requires that an opposite conclusion be clearly evident. Henderson v. Shives, 10 Ill. App. 2d 475, 480; Veselich v. Lichtsinn, 11 Ill. App. 2d 372, 382; Arboit v. Gateway Transportation Co., 15 Ill. App. 2d 500, 506. The verdict in this case is not against the manifest weight of the evidence.

Plaintiffs also contend that the trial court erred in giving defendants' instructions 1, and 13 through 24. By instruction 1 the jury was informed that if a guest in an auto knows of impending danger, it is his duty to use reasonable care to warn the driver of the danger. Instructions 13 through 18 were identical in form except for the names of the parties and told the jury that each of the three plaintiffs could not recover against each of the two defendants unless plaintiff proved three propositions, viz.: negligence, due care, and proximate cause, by a preponderance of the evidence. In like manner, instructions 19 through 24 were identical in form with reference to the several allegations made by the three plaintiffs against each of the two defendants. Plaintiffs' instructions 9, 10 and 11 with reference to the measure of damages follow the same pattern and are identical in form except for the names of the three plaintiffs. Plaintiffs complain that defendants' instructions 13 through 18 emphasized plaintiffs' burden of proof six times and were peremptory in nature, and that instructions 19 through 24 outlining the allegations in the amended complaint were particularly prejudicial because each assumed that there was no agency relationship between Vowell and Connery Freight Lines and left that question to be determined by the jury, when the question was one of law to be determined by the court. Obviously instructions 13 through 24 could have been combined into two instructions to avoid unnecessary prolixity and repetition, and probably would have been so combined had these complaints been called to the trial judge's attention.

As abstracted, the only complaints with reference to instructions made by plaintiffs' attorney were as follows: "We have no objection to the instructions down to Defendants' Instruction 16. We object to

the instructions down to Defendant's Counsel. We object to  
made by Plaintiff's attorney were as follows: "I have no objection to  
As requested, the only complaint with reference to instructions

trial judge's attention.

would have been no complaint had there been a claim called to the

instructions to be avoided unless they be in violation of the Constitution and laws of  
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when the question was one of law that the Court should be the one to

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Defendants' Instruction 16 for the reason that it does not correctly set forth the law, the law does not apply to this case. It is a direction to the jury to find that the Plaintiffs must prove by a preponderance of the evidence failure of the Defendant, Blanche Connery, with respect to negligence, and that that negligence caused the injury of the Plaintiff, and he was in the exercise of ordinary care. The recovery against Blanche Connery, if any, is as a result of agency, if established, and that question is for the jury, and the negligence of the agent, if proved, will be the negligence of the Defendant, Blanche Connery, as a matter of law. We further object to Defendants' Instruction 17, for exactly the same reason. They just change the name, with respect to the Plaintiff, Jack Foulke, and the objection is the same. We also make the same objection to Defendants' Instruction 18. Those are the only objections we have on the instructions."

Thus it appears that plaintiffs' attorney indicated to the trial court that he had no objection to instruction 1; that the case was tried on the theory that the question of Vowell's agency was for the jury, and not established as a matter of law, as now suggested; and that plaintiffs had no complaint that instructions 13 through 24 were peremptory or repetitious. We think that plaintiffs' attorney waived the objections now urged against these instructions, and that no complaint can now be made of alleged errors in instructions which the trial court was induced to give (*City of Waukegan v. Stanczak*, 6 Ill. 2d 594, 608; *Thomas v. Weber*, 14 Ill. App. 2d 564, 565), or which are raised for the first time on appeal (*Arboit v. Gateway Transportation Co.*, 15 Ill. App. 2d 500, 511).

Plaintiffs cite *Higgins v. Byrnes*, 274 Ill. App. 440, as authority for the validity of the parents' assignments of medical expenses to plaintiffs. In the cited case the court did not pass upon the question because it was not raised upon the trial, and the statute of limitations was not involved. Although the five year statute of limitations, rather than the two year statute, may be applicable to the parents' right to recover for medical expenses incurred in connection with plaintiffs'



injuries (Roth v. Lyndin, 237 Ill. App. 456, 459; Seymour v. Union News Company, 217 F. 2d 168, 170), in the instant case the parents commenced no action within five years, and the trial court properly refused to permit the filing of their assignments executed more than five years after their causes of action accrued. Plaintiffs contend that the jury should have been apprised of the expenses incurred in curing plaintiffs' injuries. According to the record, Blandford testified that he lost \$160 in wages, and his exhibits of medical expenses totaling \$400.50 were admitted without objection. Beckman said that he lost \$2000 in wages and his exhibits of medical expenses amounting to \$2509.35 were admitted by agreement. Foulke testified that he lost \$1000 in wages and his exhibits of medical expenses totaling \$744.08 were admitted without objection. The jury was fully informed concerning the nature of plaintiffs' injuries and the extent of the expenses incurred on account of such injuries. Plaintiffs were not prejudiced by the court's refusal to permit the filing of the assignments.

For the reasons indicated, the judgment of the Circuit Court of Bureau County is affirmed.

Affirmed.

DOVE, P.J., and SPIVEY, J., concur.





47275

WALTER KLIKOWSKI, a minor, by  
Frank Klikowski, his father  
and next friend,

Appellant,

v.

JACK ZIEGLER, et al.,  
Defendants below,

LEE GRAHAM and WILLIAM R.  
McDERMOTT,

Appellees.

161.A. 2d 583

APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Circuit Court of Cook County entered on March 28, 1957 dismissing Count IV of plaintiff's amended complaint and from an order entered on April 18, 1957 denying plaintiff's motion to vacate the order of March 28th.

At the very threshold of the case the defendants in their brief point out that the record on appeal was filed more than sixty days after the filing of the notice of appeal on May 24, 1957. The record was filed in this court on July 29, 1957. As his excuse for the delay in filing the record, the plaintiff contends that within the proper time an order was entered by a judge of the Circuit Court who was then hearing the call of the trial judge, which extended the time for filing the report of proceedings to July 22, 1957. The appeal was taken from an order dismissing a pleading of the plaintiff. The order was a part of the common law record. The only transcript which plaintiff sought to file was one which would have contained the



comments of the court when he entered the order complained of. The plaintiff is in error in believing that the arguments of counsel or comments of the trial court on a motion concerning the pleadings is of itself a report of proceedings as the term is used in the Practice Act. The appeal is from the order entered and not from the reasons advanced by the trial court therefor. It is a well settled rule of law that an order or decree of the trial court may be sustained on any basis appearing in the record. Becker v. Billings, 304 Ill. 190; In re Estate of Leichtenberg, 7 Ill.2d 545; Scharlau v. Lombard State Bank, 278 Ill. App. 487; Chicago Title and Trust Co. v. Schwartz, 339 Ill. 184. The motion of the plaintiff for a certificate of correctness of the so-called "report of proceedings" was subsequently denied by the trial court and no report of proceedings appears in the record before us. The order extending the time for filing the report of proceedings was of no effect since there was no report of proceedings in existence. Under those circumstances we could properly dismiss the appeal. In re Estate of Meirink, 11 Ill.2d 561; Meyer v. Meyer, 409 Ill. 316. However, no motion to dismiss was made in this court, and we will consider the matter on the merits.

The plaintiff, Walter Klikowski, a minor, by Frank Klikowski, his father and next friend, brought an action for damages against the defendants Jack Ziegler and John Bricks, police officers of the City of Chicago Heights, for assault and battery and false imprisonment. On January 24, 1957, by leave of court an amended complaint consisting of three counts



was filed, and on February 21, 1957 the plaintiff, by leave of court, filed an amendment to the amended complaint. This amendment was "Count IV" of the amended complaint and added as defendants Lee Graham and William R. McDermott. This appeal is taken from the orders of the court concerning "Count IV." On March 28, 1957, on motion of McDermott and Graham, the court dismissed the "Count IV" amendment to the amended complaint and ordered that McDermott and Graham go hence without day. On April 18, 1957 the court entered an order denying plaintiff's motion to vacate the order of March 28th. The notice of appeal states that the appeal is taken from the order of the trial court dismissing "Count IV" of the plaintiff's amended complaint entered on March 28, 1957 and from the order of the trial court entered "April 23, 1957, denying plaintiff's motion to vacate and for leave to file an Amended Count to the Amended Complaint." (Emphasis ours.) The order entered on April 18th (the date is erroneously given in the notice of appeal as April 23rd) merely dismissed the complaint and it did not rule on the question as to whether or not the plaintiff should have leave to file an amended "Count IV," nor was any reference made in that order to any such motion on the part of the plaintiff. The record does include, immediately preceding this order, a motion of the plaintiffs which was filed on July 25, 1957 to vacate the order entered on March 28, 1957 and for leave to the plaintiff to file an amended "Count IV," reciting that a copy of the amended complaint was attached thereto. No attached amended "Count IV" appears in the record in connection with this motion. There is



an amended "Count IV" in the record bearing the filing date of February 21, 1957, but which the plaintiff concedes was filed on July 25, 1957. Including in the abstract, out of its chronological order and immediately before the order of April 18th, the motion filed on July 25, 1957 which contained a request to file an amended "Count IV" is inexcusable carelessness, and it is difficult to understand how it got into the record out of its chronological order, and it is equally difficult to understand the error in both the record and the abstract with reference to the time of the filing of the amended "Count IV." Whatever action was taken on July 25, 1957 cannot be considered by us as that date was long after the notice of appeal had been filed. Wolcott v. Village of Lombard, 387 Ill. 621. Furthermore, there is nothing in the record showing that any action was taken on the motion filed July 25, 1957.

The only matter that can be considered by us is whether or not the trial court erred in its order of March 28, 1957 in dismissing "Count IV" of the amended complaint. There is nothing in the record indicating that at the time the orders of March 28th and April 18th were entered there was any amended "Count IV" asked to be filed, presented to, or in any way ruled on by the trial court.

Plaintiff in "Count IV" of the amended complaint charges Graham and McDermott, members of the Civil Service Commission of the City of Chicago Heights, with negligence in hiring the defendant Ziegler as a police officer. Ziegler had passed a civil service examination for the office of police patrolman,





and, as alleged, was hired by the defendants. Ziegler had previously been a police officer in Forest Park, Illinois, and had left that police force, as alleged, "under pressure inasmuch as he had on June 24, 1952, forcibly and without cause, bodily thrown one Reverend Lineburger, a minister of the gospel, into a police car and taken him to jail."

Plaintiff's theory is that the defendants, as members of the Civil Service Commission, could properly be held liable if they were negligent in selecting Ziegler as a police officer, if they either knew or should have known that he was unfit for the position, and in support of that contention cites Illinois cases which so hold in the case of persons not acting in a governmental capacity. In the case before us the defendants were public officers performing a public duty. This is a case of first impression in Illinois. Counsel have cited cases from other jurisdictions where, under different factual conditions, such liability was held to exist.

"Count IV" of the amended complaint filed on February 21, 1957 did not state a cause of action. Whether or not a pleading could be filed which would be sufficient to allege liability is not before us. In an early case in Illinois, McCormick v. Burt, 95 Ill. 263, which was an action brought by the plaintiff against a teacher and the directors of a school to recover damages on account of his suspension from the school for nonobservance of a rule adopted by them for the government of the school, the court held that the declaration was bad because it contained no averment that the defendants in suspending plaintiff from the benefits and



privileges of the school acted either wantonly or maliciously, and the court says:

"A mere mistake in judgment, either as to their duties under the law or as to facts submitted to them, ought not to subject such officers to an action. They may judge wrongly, and so may a court or other tribunal, but the party complaining can have no action when such officers act in good faith and in the line of what they think is honestly their duty. Any other rule might work great hardship to honest men who, with the best of motives, have faithfully endeavored to perform the duties of these inferior offices. Although of the utmost importance to the public, no considerable emoluments are attached to these minor offices, and the duties are usually performed by persons sincerely desiring to do good for their neighbors, without any expectation of personal gains, and it would be a very harsh rule that would subject such officers to an action for damages for every mistake they may make in the honest and faithful discharge of their official duties as they understand them. It is not enough to aver the action of such officers was erroneous, but it must be averred and proved that such action was taken in bad faith, either wantonly or maliciously. If, in the discharge of their official duties, such officers simply err, it is what other tribunals invested with discretionary powers are liable to do."

In the pleading before us the only allegation is that the defendants hired Ziegler as a patrolman without making any check on his previous employer, the Village of Park Forest. There is no allegation that the defendants had any knowledge that Ziegler had been employed previously by the village. There is an allegation that they acted recklessly, wantonly and wilfully in that they knew or could have known by reasonable inquiry that he was a person who, while in office, resorted to acts of unnecessary violence. In support thereof it is alleged that he had forcibly and bodily thrown a minister of the gospel in a police car and taken him to jail. That standing alone is not sufficient to show wanton and wilful misconduct. "Count IV" does not allege that the injuries to the plaintiff were the result of the alleged wrongful conduct



of the defendants, nor does it allege that the plaintiff was damaged in any way thereby.

In People ex rel. Hurley v. Graber, 405 Ill. 331, it was held that the Civil Service Commission of the City of Chicago was a quasi-judicial tribunal. The rule is well settled that public officials in the performance of their official acts are presumed to act in good faith and with honest motives. Reiter v. Illinois National Casualty Co., 397 Ill. 141. In People v. Courtney, 380 Ill. 171, the court says:

"The general rule of liability applying to judges applies alike to all officers exercising quasi-judicial powers, and they are exempt from liability for error or mistake of judgment in the exercise of their duty in the absence of corrupt or malicious motives. (People v. Bartels, 138 Ill. 322; Kendall v. Stokes, 3 How. 87, 11 L.ed 506-833; McCormick v. Burt, 95 Ill. 263; Gilbert v. Bone, 64 id. 518.)"

In the concurring opinion of Justice Shenk in Fernelius v. Pierce, 138 P.2d 12, at p. 24, a case cited by the plaintiff in support of his theory, it is said:

"A sound public policy supports the general rule of nonliability of superior public officers for the torts of inferior civil service officers and employees and exceptions to that rule should not be extended; otherwise the assumption of public office with liability for the misdeeds of inferiors occupying civil service positions, many times numbering thousands, would indeed be a hazardous undertaking."

Also see Paoli v. Mason, 325 Ill. App. 197. As we have stated, it is not necessary for us to decide whether or not the members of a city Civil Service Commission could in any case be liable for negligence in certifying to the position of police patrolman a person who was unfit because of his past conduct. The only question before the trial court and before us is whether or not the "Count IV"



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amendment stated a cause of action, and we have held that it did not even if it were assumed that such liability could have been properly imposed upon the defendant members of the Civil Service Commission.

We find no error in the record and the orders of the Circuit Court are affirmed.

Affirmed.

Schwartz, P. J., and Robson, J., concur.

Abstract only.





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47231  
47243

In the Matter of the Estate of  
MARGARET L. W. PINE (Alleged  
Incompetent)

FRED A. GARIEPY, Guardian ad  
Litem,  
Petitioner below,  
Appellee,

47231 v.

ROBERT J. GORMAN,  
Respondent below,  
Appellant.

ROBERT JEROME DUNNE,  
Appellee.

In the Matter of the Estate of  
MARGARET L. W. PINE (Alleged  
Incompetent)

FRED A. GARIEPY, Guardian ad  
Litem,  
Petitioner below,

47243 v.

ROBERT J. GORMAN,  
Respondent below,

PEOPLE OF THE STATE OF ILLINOIS  
Defendant in Error,

v.

ROBERT J. GORMAN,  
Plaintiff in Error.

MR. JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

Robert J. Gorman, an attorney at law, was adjudged in contempt of the Probate Court on July 20, 1956, and has sued out a writ of error from this court to review that order. He had taken an

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APPEAL FROM CIRCUIT COURT,  
COOK COUNTY.

ERROR TO PROBATE COURT,  
COOK COUNTY.



appeal from that order to the Circuit Court of Cook County, which court on February 20, 1957 dismissed the appeal for want of jurisdiction, from which order of the Circuit Court he takes an appeal to this court. The cases have been consolidated for hearing.

The proceedings under which Gorman was adjudged in contempt of court had its genesis in an action in the Probate Court concerning the competency of one Margaret Pine, a woman 84 years old. She had close contact with one Lillian Turbush whom she had raised and educated as a daughter, but whom she did not adopt. Margaret Pine, who owned considerable property, had in a will made prior to 1950 designated Lillian Turbush as her principal beneficiary. About 1946 Lillian Turbush and her husband had moved to Missouri. In 1950 Margaret Pine requested one of her tenants, Victor Wozny, to collect the rents from her buildings, and changed her will to make him her principal beneficiary instead of Lillian. In 1954 Lillian Turbush returned to Chicago. Prior to her return Margaret Pine had a dispute with Wozny and had directed him to do nothing further with respect to her business. Margaret Pine retained Robert J. Gorman as her attorney to make a new will for her in which Lillian Turbush would be made the principal beneficiary as she was in the first will. Wozny retained an attorney and Gorman then at the direction of Margaret Pine prepared conveyances of her real estate to Lillian. Wozny thereupon filed a petition in the Probate Court of Cook County to have Margaret Pine declared incompetent, and she was served with summons. Gorman entered her appearance in the incompetency proceedings. The judge of the Probate Court on June 9, 1955 appointed Fred M. Gariepy



as guardian ad litem without notice to the alleged incompetent. On June 20, after serving notice, Gorman filed a motion to vacate the appointment of a guardian ad litem, which motion was denied. At the same time, without petition or notice, the court entered an order on the motion of Gariepy, the guardian ad litem, that "Margaret Pine submit to examination and see said Guardian ad Litem forthwith" and that "Gorman so advise her as her attorney and refrain from interfering with said Guardian ad Litem and his physician. On June 28, 1955 Gariepy, ex parte, without notice or petition, secured an order from the Probate Court that "Gorman produce said alleged incompetent in open court within ten days from date for consultation with the Guardian ad Litem and for examination by doctor or doctors selected by said Guardian ad Litem." On October 20, 1955 Gariepy filed a petition for a rule upon Gorman to show cause "why he should not be held in contempt for a disobedience of the orders of the court entered herein with reference to presentation, seeing, visiting and examining Margaret Pine on the part of the petitioner herein, and resisting efforts of the petitioner to perform his duty as Guardian ad Litem." In the verified petition Gariepy alleged that he had held several conferences with one Gannon, the attorney for the petitioner Wozny, in an effort to obtain information as to the physical and mental state of the alleged incompetent; that Gorman had been repeatedly asked for permission to see and examine the said incompetent; that during the month of October effort had been made to serve process on the incompetent in order to see her and have her examined; that the petitioner has written letters making this request to Edwin Halligan,



co-counsel with Gorman, which letters have not been answered; that the incompetent is under the domination and control of Turbush and her husband and has been moved by them from her residence on Garfield boulevard to that of one Mrs. Mahoney; that the efforts of the guardian ad litem to have process served on the incompetent were frustrated by Gorman, who had given a verbal direction to Mrs. Mahony not to permit anyone to talk to, or visit with, the incompetent; that Gorman had violated the orders of the court in that he did not produce the incompetent for examination and had failed to permit the guardian to see and examine the incompetent. Attached as exhibits were copies of the various deeds executed by Margaret Pine conveying certain real estate to Lillian Turbush, and it is alleged that the approximate value of such properties exceeds the sum of \$100,000 reasonably appraised. Petitioner also alleges that on or about the time of the execution of the said deeds the incompetent had been examined by a physician at the instigation of Gorman or Lillian Turbush and her husband, or all of them, and he prays that Gorman be ruled to show cause why he should not be held in contempt for "disobedience of the orders of the court entered herein with reference to presentation, seeing, visiting and examining Margaret Pine on the part of the petitioner herein, and resisting efforts of the petitioner to perform his duty as Guardian ad Litem." On October 20, 1955 the court entered an order requiring Gorman to answer or plead to the petition in ten days and ordering Wozny, the original petitioner in the incompetency proceedings, to answer the petition within ten days. No answer of Wozny appears in the record.





On October 31, 1955 Gorman filed a verified motion to dismiss the petition. In that motion he alleged that he had at a conference divulged to the guardian ad litem all of the facts concerning the case and that the guardian ad litem immediately took the position that Margaret Pine was incompetent and that his attitude was then and ever since has been hostile and antagonistic to Margaret Pine and her attorneys. He denied that he ever prevented the incompetent from doing, or compelled her to do, anything of any kind or nature whatsoever. He states that his relation with her was only that of attorney and client and that she was not a chattel in his possession subject to being produced at his desire; that Gariepy, while ostensibly representing Margaret Pine, was making every effort to have her declared incompetent; that the previous orders for Gariepy to have a medical examination of Margaret Pine and for Gorman to desist and refrain from interfering were obtained without notice of the petition or without an opportunity for argument on the part of Margaret Pine or her attorneys; that it is impossible for Margaret Pine to obtain a fair trial if Gariepy continues as her guardian ad litem; that on every one of the numerous times when the incompetency proceeding was called for trial Margaret Pine responded ready but that Gariepy has continued presenting petitions in order to postpone the trial and in an attempt to obtain evidence to aid the tenant Wozny. The motion requested that the petition of Gariepy be dismissed.

Attached to this motion as an exhibit was a letter dated June 30, 1955 from Gorman to Margaret Pine in which Gorman informed

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her of the order of the Probate Court that she submit to a medical examination under the direction of Gariepy and asked her to submit to the examination at Gariepy's convenience, stating: "Kindly make your own appointment with Mr. Gariepy as I find him personally obnoxious." The exhibit indicates a copy of this letter was sent to the judge of the Probate Court and to Gariepy. Also attached to the motion was a letter dated July 2, 1955 from Margaret Pine to Gorman in which she said that she would have nothing to do with Gariepy, nor would she be examined by any doctors selected by him.

Gariepy filed a reply to the motion to dismiss, in which he denied the allegations of the motion except that he admits the receipt of a copy of the attached letter by Gorman to the incompetent, and admits that there were disputes between him and Gorman concerning the competency of Margaret Pine.

The hearing on the rule was continued from time to time. No action apparently was taken on Gorman's motion to dismiss, nor was any order entered that it should stand as an answer. On July 12, 1956 the court entered an order which recited, among other things, that the court "being fully advised in the premises" and "having heard evidence in open court," finds that Gorman was hostile to, and failed to cooperate with, the guardian ad litem in the efforts of the guardian ad litem in accordance with the wishes and direction of the court to ascertain the mental and physical condition of the alleged incompetent; "that said Robert J. Gorman aided and assisted in denying said guardian ad litem free access to said alleged incompetent and aided and assisted said alleged



incompetent to avoid service of process in connection with this proceeding"; that his conduct was "contemptuous and designed to bring the administration of justice into disrepute." The order further stated that the conduct of the said respondent should be reprimanded and memorialized and that a copy of this order be entered on the records of the court and a certified copy thereof be transmitted to the Chicago Bar Association. From this order an appeal was taken to the Circuit Court of Cook County, at which time the state's attorney of Cook County entered his appearance on behalf of the judge of the Probate Court of Cook County, and on February 20, 1957 the Circuit Court dismissed the appeal for "want of jurisdiction," from which order this appeal is taken; and the review of the order of the Probate Court entered on July 12, 1956 is brought here by writ of error.

Section 118 of the Probate Act (par. 270, chap. 3, Ill. Rev. Stat. 1957) provides that in proceedings for the appointment of a conservator the court may appoint a guardian ad litem to represent the alleged incompetent in the proceedings. It is, however, presumed that all adult persons are of sound mind and capable of managing their own affairs and caring for their estate. Isle v. Cranby, 199 Ill. 39. In considering the appointment of a guardian ad litem the question to be determined is the capacity of the person whose fitness is challenged to intelligently choose counsel and consult and advise with him in the conduct of the litigation, or capacity to manage and care for the particular business or matter involved. Cowdery v. Northern Trust Co., 321 Ill. App. 243. In Rankin v. Rankin, 322 Ill. App. 90, the alleged incompetent,



who was represented by his own attorney, appealed on the ground that the court should have appointed a guardian ad litem to represent him, and the court said in rejecting his contentions:

"In many cases, and the one before us is an example, where it appears that the alleged incompetent is aware of the nature of the proceeding brought against him and possesses sufficient judgment to select his own counsel to defend his interests, then we do not think that any useful purpose would be served by the appointment of a guardian ad litem. We can conceive, however, that other cases may arise where it would be apparent that the alleged incompetent by reason of his physical or mental condition was not capable of defending his own interests when it would be an abuse of discretion for the court not to appoint a guardian ad litem."

In the case before us there is nothing in the record to indicate that any investigation of the incompetent was made before the appointment of the guardian ad litem. A person in a proceeding brought to declare him incompetent has the right to retain his own attorney. It is a generally accepted rule that there should be no conflicting interest between the incompetent and the party representing him. Clarke v. Chicago Title & Trust Co., 393 Ill. 419. This rule also applies to a guardian ad litem. Here it is apparent that immediately after the appointment of the guardian ad litem a conflict developed between the attorney properly representing the alleged incompetent and the attorney appointed guardian ad litem. It is also worthy of note that the initiation of the proceedings to have Margaret Pine declared incompetent was commenced by one Wozny in order to prevent her from conveying her property to another person and so making the will in which he was her principal beneficiary of no value. Under those circumstances it would seem that it would be the duty of the Probate Court to require that notice be given to the alleged incompetent and that it should proceed with





extreme caution in the exercise of its discretion to appoint a guardian ad litem.

The question has been raised as to whether or not the alleged contempt in this case was a civil or a criminal contempt. No point is made upon the question as to whether or not the order of the Probate Court is properly before us on a writ of error, and even if it was raised this question could have no bearing upon our right to hear and determine the case. People v. Elbert, 287 Ill. 458; Supreme Court Rule 28.

In 12 I.L.P. Contempt, sec. 5, it is stated:

"A criminal contempt is conduct which is directed against the majesty of the law or the dignity and authority of the court or judge acting judicially. It is an act which is in disrespect of the court or its process and which tends to bring the court into disrepute or obstruct the administration of justice.

"\* \* \*

"A civil contempt ordinarily consists in failing to do something ordered to be done by a court in a civil action for the benefit of an opposing party therein. \* \* \*

"As frequently stated by the Illinois courts, a civil contempt is to be distinguished from a criminal contempt in that a civil contempt is a quasi contempt which consists in the contemnor failing to do something which he is ordered to do by the court for the benefit or advantage of another party to the proceeding before the court, while a criminal contempt is an act committed against the majesty of the law in disrespect of the court or its process, or tending to bring it into disrepute or to obstruct the administration of justice. In a civil contempt the court acts for the benefit of a party to an action while in the case of a criminal contempt the court acts primarily to preserve its dignity and respect by punishing the wrongdoer.

"However, the dividing line between acts constituting criminal and those constituting civil contempts becomes indistinct in those cases where the two gradually merge into each other."

A proceeding for the appointment of a conservator is in the



nature of a proceeding by the people for the purpose of protecting the estate of the alleged distracted person. Joost v. Racher, 148 Ill. App. 548. In the contempt order, without any recital of facts or references to the filed petitions nor without stating that Gorman was present in court, the court found that the "said Robert J. Gorman aided and assisted in denying said guardian ad litem free access to said alleged incompetent and aided and assisted said alleged incompetent to avoid service of process in connection with this proceeding," and we assume, without passing on it, that the Probate Court had the right to enter the order that Gorman refrain from interfering with the guardian ad litem and his physician. The order that Gorman produce the incompetent in open court for examination by doctors selected by the guardian ad litem is not involved in the contempt order and we do not pass on its validity.

The order holding Gorman in contempt had many indicia indicating that the proceeding was one in criminal contempt, but it had an equal number to support the theory that the contempt was civil. If the order is regarded as a proceeding in criminal contempt, it is defective in that it fails to contain the necessary recital of the presence of the defendant and of the evidentiary facts necessary in a criminal contempt order. Porter v. Alexenburg, 396 Ill. 57. If we consider the proceeding as a civil contempt, we find in the brief filed in this court on behalf of Gorman an order entered on June 18, 1956 in the Circuit Court of Cook County. This order was entered on a hearing de novo in the Circuit Court on an appeal from the order of the Probate Court



finding Margaret Pine incompetent. We have a right to consider the Circuit Court order in determining whether or not the incompetency action has become moot, even though the order does not appear in the record. Wick v. Chicago Telephone Co., 277 Ill. 338; Eastman v. Dole, 213 Ill. App. 364, 370. By that order Margaret Pine was adjudged competent. The order holding Gorman in contempt was entered July 12, 1956, subsequent to the final determination of the incompetency proceedings in the Circuit Court. In a civil contempt the penalty inflicted is by way of execution of the court's order. If the issue as to the mental condition of the person in the proceedings has been adjudicated, it becomes moot, and the court then has no further concern with the enforcement of a previously entered order requiring an examination concerning such mental condition. Eastman v. Dole, supra. In People v. Redlich, 402 Ill. 270, where the defendant refused to submit to a mental examination under the Criminal Sexual Psychopathic Act which was ordered in connection with his indictment for a sexual offense, the court held the defendant in contempt. By the court's order he was sentenced to jail until he complied with the order of the court or was discharged according to law. He was subsequently tried upon the indictment, found guilty and sentenced to the penitentiary. The Supreme Court held that the contempt of which the defendant was guilty was a civil contempt, and says:

"The sentence of imprisonment imposed is a coercive measure to secure defendant's obedience to the order that he submit to an examination by the psychiatrists, and the term of such imprisonment is limited by the period of his noncompliance with said order. But, if defendant should now submit to such examination, no possible benefit could result therefrom. The court ordering the examination has



lost all jurisdiction. It no longer has any concern with the mental condition of the defendant, because that issue has now become moot. A question is said to be moot when it presents or involves no actual controversy, interests or rights of the parties, or where the issues have ceased to exist. (Chicago City Bank and Trust Co. v. Board of Education, 386 Ill. 508.) The general rule is that when a reviewing court has notice of facts which show that only moot questions or mere abstract propositions are involved or where the substantial questions involved in the trial court no longer exist, it will dismiss the appeal or writ of error. Tuttle v. Gunderson, 341 Ill. 36."

Furthermore, in the case before us, prior to the entry of the order finding Gorman guilty of contempt, an appeal had been taken to the Circuit Court and an order finding Margaret Pine competent had been entered in the very case out of which the contempt proceedings developed. In Burstein v. Millikin Trust Co., 350 Ill. App. 462, the court said in discussing an appeal from the Probate Court to the Circuit Court:

"The words de novo have been defined as meaning 'fresh' or 'anew'. A de novo trial in an appellate court, which the circuit court was in this instance, is a trial had as if no action whatever had been instituted in the court below. De novo also means a 'second time.' Words and Phrases, Vol. 12, page 70. In Schwartzfager v. Schwartzfager, 330 Ill. App. 111 at page 113, the court said: 'It has been repeatedly held both by the Supreme and Appellate Courts of this State, that in appeals from the probate court to the circuit court, the hearing is a trial de novo, and the appeal acts to set aside any order that might have been rendered in the probate court. The circuit court does not sit as a court of errors, but should try the case the same as though it had never been tried before, which on further appeal to the Appellate or Supreme Court, the judgment should be reviewed as that of the circuit court and the view of the probate court is of no importance in passing on that judgment.'"

The order of the Circuit Court of June 18, 1956 further provided that the orders entered in the Probate Court of Cook County in case Number 55 P 2331, In the Matter of the Estate of Margaret L. W. Pine, be expunged.

Whether the order is considered to have been entered in





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a proceeding for criminal contempt or in a proceeding for civil contempt it cannot stand. The order of the Probate Court of Cook County finding Robert J. Gorman in contempt of court, which order is before us on a writ of error, is reversed. The appeal before us from the order of the Circuit Court dismissing the appeal from the Probate Court for want of jurisdiction is dismissed. Each party to the proceedings before us shall bear his own costs.

Gen. No. 47231, appeal dismissed;  
Gen. No. 47243, order reversed.

Schwartz, P. J., and Robson, J., concur.

Abstract only.



IN THE  
APPELLATE COURT OF ILLINOIS

---  
SECOND DISTRICT  
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February Term, A.D., 1957

GENERAL ACCIDENT FIRE AND LIFE  
ASSURANCE CORPORATION, LIMITED,

Plaintiff-Appellant,

vs.

MELVIN J. G. LINDENMIER, JR.;  
MELVIN J. G. LINDENMIER, SR.;  
KENNETH R. LINDENMIER; MARGARET  
D. JOHNSON, Administratrix of  
the Estate of DONNA M. JOHNSON,  
Deceased; EVERETT JOHNSON;  
MARGARET JOHNSON; SANDRA JOHNSON;  
KAREN JOHNSON; and RODNEY  
JOHNSON,

Defendants-Appellees.

161A<sup>21</sup> 585

APPEAL FROM THE  
CIRCUIT COURT OF  
WINNEBAGO COUNTY,  
ILLINOIS.

Per Curiam:

General Accident Fire and Life Assurance Corporation filed its complaint in the Circuit Court of Winnebago County praying for a judgment declaring that the defendants, Melvin J. G. Lindenmier, Jr., and Melvin J. G. Lindenmier, Sr., were not afforded insurance coverage of any kind under the provisions of a certain policy of insurance issued by the plaintiff to Melvin J. G. Lindenmier, Jr. Subsequently an amended complaint was filed and thereafter, on December 15, 1956, a second amended complaint was filed. Kenneth R.



Lindenmier, a brother of Melvin J. G. Lindenmier, Jr., Margaret D. Johnson, individually and as administratrix of the estate of Donna K. Johnson, deceased, together with Everett, Margaret, Sandra, Karen and Rodney Johnson were added as parties defendant.

Answers were filed and after an extensive hearing the court entered a declaratory judgment finding that on June 18, 1954, a written application for liability and property damage coverage was made by Melvin J. G. Lindenmier, Jr., to plaintiff and that on September 15, 1954, plaintiff issued to him its combination automobile policy insuring a 1948 Ford Automobile belonging to this defendant for a policy period beginning August 10, 1954, and ending August 10, 1955; that this policy provided that the insured had thirty days from the date of its acquisition within which to notify the company that he had a newly acquired automobile which replaced the automobile described in the policy and that he wanted a transfer of coverage to the newly acquired car; that on or about July 24, 1954, the motor in the insured Ford automobile was removed and the automobile taken out of service; that on or about December 2, 1954, the defendant, Melvin J. G. Lindenmier, Sr., father of the insured, made a gift of a 1950 Chevrolet automobile to his son, Melvin J. G. Lindenmier, Jr., and that this Chevrolet car was not a temporary substitute for the insured Ford car; that on December 18, 1954, while driving this Chevrolet automobile, accompanied by his brother, Kenneth, the insured was involved in an automobile collision with an automobile driven and owned by Everett Johnson; that the first notice



plaintiff had of this accident and the first request it had for transfer of coverage from the 1948 Ford automobile to the 1950 Chevrolet was on December 30, 1954, at which time the insurance broker of the insured telephoned the plaintiff and gave to the company this information and thereafter said insurance broker, on behalf of the insured, mailed to plaintiff an application to transfer the coverage afforded by the policy from the Ford to the Chevrolet, which plaintiff did by endorsement, dated December 31, 1954, effective as of December 3, 1954.

Upon these findings the court adjudged that Melvin J. G. Lindensier, Jr., the insured, became the owner, by gift, of the Chevrolet on December 2, 1954, and that while being driven by its owner on December 18, 1954, it was involved in an automobile collision involving some of the other defendants; that on December 18, 1954, the insured owned the Ford automobile, but it was without a motor and mechanically inoperable; that the provisions of the policy which gave the insured thirty days within which to notify the plaintiff of a newly acquired automobile and that he wanted transfer of coverage to it, if the newly acquired automobile replaced the automobile described in the policy, gave the insured the benefit of the coverage provided by the policy during that period and the fact that an accident to the newly acquired automobile may have intervened within this thirty-day period and prior to notification and request for transfer to the insurance company would not, in any way, alter this thirty-day period of automatic coverage on the newly acquired automobile of the insured.

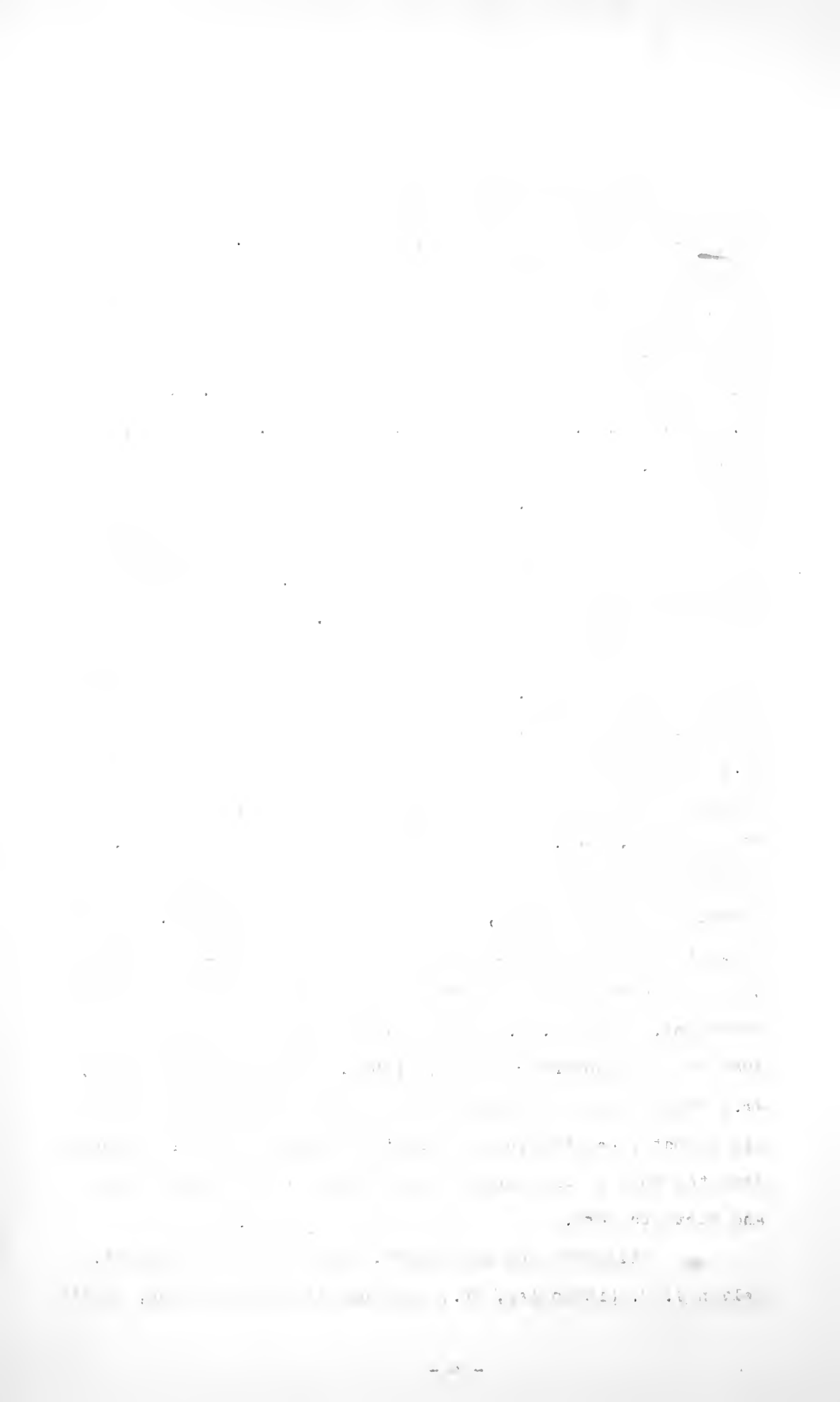




The court further adjudged that the 1950 Chevrolet automobile which the defendant, Lindenmier, Jr., was driving at the time of the collision with the car owned and driven by Everett Johnson was covered by the insurance policy which the plaintiff insurance company had originally issued to this defendant, and that the defendants, Melvin J. G. Lindenmier, Sr., Melvin J. G. Lindenmier, Jr., Kenneth R. Lindenmier, Margaret E. Johnson, individually and as administratrix of the estate of Donna M. Johnson, and Everett, Margaret, Sandra, Karen and Rodney Johnson were all entitled to any benefits they may have or possess under said policy. To reverse this declaratory judgment, plaintiff appeals.

It appears from the pleadings and the evidence that on September 15, 1954, plaintiff issued the automobile liability policy involved in this proceeding to defendant Lindenmier, Jr., which covered a 1948 Ford automobile and that the policy period of that policy began on August 10, 1954, and expired on August 10, 1955. In the latter part of November, 1954, this <sup>Ford</sup> automobile covered by this policy "conked out," as described by the witness, and defendant Lindenmier, Jr., ceased to operate it and stored it in the back yard of his father's home and never drove it thereafter. At that time, his father, defendant, Melvin J. G. Lindenmier, Sr., owned two cars, a 1950 Bel Aire Chevrolet and a Mercury. Defendant Lindenmier, Jr., then a minor of seventeen years of age and living with his parents, was working in a factory located some five blocks from the home of his parents and needed a car to drive back and forth to work.

Elizabeth Ann Lindenmier, the mother of defendant, Melvin J. G. Lindenmier, Jr., and the wife of defendant, Melvin



J. G. Lindenmier, Sr., testified that on December 6, 1954, she called the office of Harley Knapp, an insurance broker in Rockford, and told the son of Harley Knapp that the defendant Lindenmier, Jr., had given defendant Lindenmier, Jr., the 1950 Chevrolet and requested that he have the insurance policy, which the plaintiff company issued to defendant Lindenmier, Jr., on the 1948 Ford, transferred from the Ford to the Chevrolet. The evidence discloses that Harley Knapp was not in his office on that day, but his son took Mrs. Lindenmier's message, made a note of the same and left it on his father's desk; that Harley Knapp, upon returning to his office from Chicago on December 8, found the note; that he, Knapp, needed certain information relative to the serial number and motor number of the Chevrolet before he could have the policy transferred and tried to contact the Lindenmiers several times within the next days, but was unsuccessful in doing so; that on December 20, which was 10 days after defendant Lindenmier, Jr., had the collision involving the Johnson car, Knapp called the office of the plaintiff in Chicago and talked with a Mr. Cerny, underwriting manager of that office, and advised him that he desired the coverage of the policy, which plaintiff had with Lindenmier, Jr., transferred from the 1948 Ford to the 1950 Chevrolet.

It also appears from the evidence that Knapp advised Mr. Cerny that the Chevrolet had been involved in an accident on December 18 and Mr. Cerny told Knapp that the transfer would be made so that the coverage would be extended from the Ford to the Chevrolet and that he would prepare the necessary policy endorsement and send it to Knapp. This was afterwards done and a policy endorsement was issued, dated



December 21, 1954, and date retroactive to December 6, 1954, the date when Mrs. Lindenmier first notified Knapp that it was desired to change the coverage from the Ford to the Chevrolet.

Melvin J. G. Lindenmier, Jr., testified that on December 2, 1954, he turned over to his son as a gift the 1950 Bel Aire Chevrolet automobile and that the reason he did so was that the Ford car which his son had been driving ceased to operate and that his son needed a car to go back and forth to work because it was winter time and the weather was cold. He further testified that there was a loan on the car and that his son was to pay off this loan by making payments to the father and the father, in turn, was to pay the money to the finance company which held the lien on the car.

Melvin J. G. Lindenmier, Jr., testified that on December 2, 1954, his father gave him the Chevrolet in question and that he agreed to pay the required instalments due the finance company which held a lien on the Chevrolet as the payments became due; these payments to be made to his father and his father, in turn, would then pay the finance company.

The testimony of the mother, father and son that a gift was made by the father to the son of this Chevrolet car was positive and definite and was not discredited by lengthy cross-examinations, nor were these witnesses impeached. The evidence is that prior to December 2, 1954, the son drove the Chevrolet only a few times, but after that date and until the accident on the 18th, he drove it practically every day. The certificate of title to the Chevrolet was then in possession of the local finance company which held the lien, and that

1. The first step is to identify the problem or goal. This involves understanding the current situation, the desired outcome, and the constraints. It is important to be clear and specific about what you want to achieve.

is the explanation made by these witnesses for the failure of the father at that time to assign the title to the son.

One of the provisions in the policy issued by plaintiff company to defendant Lindenmier, Jr., and which is therein designated as Article IV of Insuring Agreements provides:

"(a) Automobile. Except where stated to the contrary, the word 'automobile' means:

"(4) Newly Acquired Automobile - an automobile, ownership of which is acquired by the named insured who is the owner of the described automobile, if the named insured notifies the company within thirty days following the date of its delivery to him, and if either it replaces an automobile described in this policy or the company insures all automobiles owned by the named insured at such delivery date; but the insurance with respect to the newly acquired automobile does not apply to any loss against which the named insured has other valid and collectible insurance. The named insured shall pay any additional premium required because of the application of the insurance to such newly acquired automobile."

The judgment found that this article granted the insured thirty days in which to notify the company he had a newly acquired automobile and that he desired a transfer of coverage from the old car to the newly acquired car. The court also determined that the fact that an accident to the newly acquired automobile may have intervened within this thirty-day period and prior to notification and request for transfer to the insurance company did not in any way alter this thirty-day period of automatic coverage on the newly acquired automobile of the insured and that the 1950 Chevrolet was a newly acquired automobile within the meaning of the policy.

The court's interpretation of this thirty-day provision in the insurance policy is correct. We believe,





under the language of this policy, that the thirty days given to the insured to transfer his insurance coverage from one automobile to another one which he had newly acquired was an absolute and unconditional right given to him as such insured, and the fact that the insured may have had an accident with the newly acquired automobile within that thirty-day period did not take away or destroy the right given to him by this provision. For thirty days he had automatic coverage on a newly acquired automobile to which he desired to transfer the coverage which he had on another car. This is what the language of the policy provides and it cannot be arbitrarily disregarded.

The controlling question of fact in this case is whether or not there was an actual gift on or about December 2, 1954, of the 1950 Chevrolet by the father to his son. ~~XXX~~ Whether ~~XXXXXXX~~ a gift has been made in a particular case is determined by the facts and circumstances attending the alleged gift. (Rothwell v. Taylor, 303 Ill. 226, 230; People v. Polhemus, 367 Ill. 185.) In determining whether ~~XXXXXX~~ a gift has actually been made, the controlling fact is the delivery of the subject matter of the gift by the donor to the donee with the intent to pass title. (Rothwell v. Taylor, 303 Ill. 226; Williams' Estate v. Tuck, 313 Ill. App. 230.) In a transfer of property from a parent to a child, there is a presumption of a gift, but such presumption may be rebutted. (Nolan v. American Telephone & Telegraph Company, 326 Ill. App. 328.) Here, the testimony is direct and positive by three witnesses that the father gave the Chevrolet car to his son and that the gift was unconditional and made with the intent to pass title immediately.



It is argued by counsel for a appellant that the testimony by Mr. and Mrs. Lindemier and their son of a gift from the father to the son is a family story of convenience. However, there is no evidence supporting this conclusion. We have read all of the evidence in this record. The trial court heard and saw the witnesses and observed their demeanor while testifying and made certain findings of fact in favor of the defendant. The evidence found in this record sustains the findings of the trial court and its judgment is not manifestly against the weight of the evidence, (Reese v. Laymon, 2 Ill. 2d 614) and, therefore, must be affirmed.

Judgment affirmed.













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| 2/26/77 | R.J. Fox    |             |  |
| 4/28/77 | M. Guedes   | FR. 2-3788  |  |
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| 7/15/77 | C. Antonio  | 11 27-83 11 |  |
| 7/22/77 | M. G. G. G. | 332 0913    |  |
| 8/11/77 | D. Kubly    | 346 5750    |  |
| 8/29/77 | S. ADAMIEC  | 232 9350    |  |
| 11-14   | W. W. W. W. | 876 7964    |  |
| 2-1-78  | J. Brownlie | 443 0646    |  |
| 2/17/78 | P. Dittell  | 327 5477    |  |

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